



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

US 913NY BAT
The law of domestic relations in th
HARVARD LAW LIBRARY APK6333



3 2044 031 794 423



HARVARD LAW SCHOOL
LIBRARY

**WAIT'S LAW AND PRACTICE
SEVENTH EDITION**

First consult Wait's Law and Practice, Seventh Edition, on any question that comes up. Wait gives the Substantive Law of New York in the most convenient form.

Wait contains 119 chapters which treat as many different subjects and covers nine-tenths of the titles of the law [and more than that proportion of the legal questions litigated in Courts of Record. Wait's Law and Practice has been the standard for over forty years. Three large volumes, \$18.00 net, \$19.00 delivered. For sale by all Law Booksellers.

248

4

CF

Feb 6

THE LAW

OF

DOMESTIC RELATIONS

IN THE

STATE OF NEW YORK

BY ^{Williams}
FLETCHER W. BATTERSHALL



8

ALBANY, N. Y.
MATTHEW BENDER & COMPANY
1910

S
10
13
14
15

Tv
B3354

**COPYRIGHT, 1910,
BY MATTHEW BENDER & COMPANY.**

MAR 20 1912

PREFACE.

THIS work deals not only with the Domestic Relations Law of the State of New York, as found distributed in the various statutes and codes, but also with the common and Canon law, upon which the statutes are founded, or which they modify. This, because it is thought that no adequate comprehension of the present law can be had without a knowledge of its origin. As the law of Domestic Relations is wholly a matter of state control, and as divorce is wholly a creation of state statute, a general work on the subject must necessarily either assume vast proportions or be so meagre as to be well-nigh useless to a practitioner in any particular state. Hence, the work purports to cover only the law of New York State, though it is thought that it will be found useful by practitioners and students in other jurisdictions owing to the fact that the rules of the common and Canon law are given.

Each subdivision of the work is prefaced by a statement, in heavy faced type, of the main elements of the statute or common law, as the case may be, expressed in the briefest form. The writer has not the presumption to suppose that the rules so stated comprise all the details of the statute. They are intended rather as an index or preface to the statute

and give a general idea of its purport, so that the practitioner or student before delving into the intricacies of the statute itself, (which in all cases follows the author's syllabus) may have a general idea of the matters to be found therein.

It is believed that all the decisions of the State of New York bearing upon the subjects treated will be found in this work, save such as may be mere repetitions of well established rules, or such as have been overruled. The more important and instructive decisions are digested in the body of the main text, and these are followed by decisions printed in smaller type dealing with the various exceptions to or modifications of the rule.

The work deals not only with the substantive law but with practice in all cases where the latter differs from that in the ordinary actions or special proceedings so that the book will be found to be a working manual for the practicing lawyer.

But the rules as dealt with in the captions to the various sections and in the main text are designed as well to meet the needs of the student who, in any particular jurisdiction, must acquaint himself with the common and Canon law, the statutes and leading cases.

I wish to express my obligation to Mr. Frank B. Gilbert for his permission to use matter appearing in his work on domestic relations, to Mr. Alexander T. Selkirk for his kindness in verifying the citations and seeing the work through the press and to Mr. Harry Cook for making the index.

F. W. B.

Albany, N. Y., September 28, 1910.

TABLE OF CONTENTS.

CHAPTER I.

MARRIAGE.

	PAGE
Nature of the Relation.....	1
Marriage as a Contract.....	2
Breach of Promise to Marry.....	5
Law of Place of Contract Governs.....	7

CHAPTER II.

SOLEMNIZATION OF MARRIAGE.

Common Law Requirements.....	10
Formalities of Marriage under New York Statute.....	18

CHAPTER III.

MATRIMONIAL ACTIONS—JURISDICTION.

Historical Review	33
Legislative Divorces	36

CHAPTER IV.

ANNULMENT OF MARRIAGES.

Void and Voidable Marriages.....	44
Void Marriages	45
Consanguinity	46
Polygamous Marriages	49
Voidable Marriages	52

	PAGE
Lack of Age of Consent.....	54
Mental Incapacity	58
Physical Incapacity	60
Force, Duress and Fraud.....	63
Former Spouse Living.....	72

CHAPTER V.

DIVORCE.

Jurisdiction in Actions for Divorce.....	79
Proof of Adultery	83
When Divorce Not Granted; Defenses.....	91
Effect of Divorce.....	96
Remarriage after Divorce.....	102

CHAPTER VI.

SEPARATION.

Separation Agreements	105
Action for Separation	113
Defenses	124
Relief Given	128

CHAPTER VII.

PRACTICE IN MATRIMONIAL ACTIONS.

Summons	134
Complaint	138
Answer	145
Rights of Correspondents.....	148
Trial	150
Right to Jury Trial.....	152
Reference	158
Evidence in Divorce Actions.....	163
Effect of Default.....	166
Interlocutory Judgment.....	171
Final Judgment	174
Vacating Judgment	177
Appeals	181
Costs—Liability for Attorney's Fees.....	184

TABLE OF CONTENTS.

vii

CHAPTER VIII.

ALIMONY—SUPPORT AND CUSTODY OF CHILDREN.

	PAGE
Alimony	188
Alimony <i>Pendente Lite</i>	189
Alimony Awarded by Final Judgment	208
Custody of Children	216
Modification of Final Decree	219
Enforcing Payment	225
Enforcing Foreign Decree	227
Contempt Proceedings	232

CHAPTER IX.

FOREIGN DIVORCES.

Conflict of Laws	239
Validity of Foreign Decree	240

CHAPTER X.

PERSONAL AND PROPERTY RIGHTS OF HUSBAND AND WIFE.

Wife's Rights at Common Law	250
Married Woman's Acts	256
Real Estate of Married Women	258
Tenancy by the Entirety	261
Ante-Nuptial Contracts	264
Contracts between Husband and Wife after Marriage	271
Husband's Duty to Support Wife	277
Wife's Right to Her Earnings	287
Husband and Wife as Agents	294
Debts of Husband and Wife	297
Insurance on Husband's Life	299
Personal Rights of Husband	309
Torts by and Against Married Women	311
Criminal Conversation, Etc.	316
Husband and Wife as Witnesses	320

CHAPTER XI.

DOWER.

Nature of Dower	323
How Dower may be Lost	334

	PAGE
Effect of Divorce	344
Widow's Quarantine	346
Action for Dower	347

CHAPTER XII.

COURTESY.

Nature of the Estate	361
Courtesy Initiate	365
Effect of Married Woman's Acts	366

CHAPTER XIII.

PARENT AND CHILD.

Right to Custody—Habeas Corpus	370
Parent's Duty of Maintenance	382
Abandonment of Children	383
Parent's Liability for Necessaries	389
Education of Children	390
Disinheritance of Children	393
Support of Parents by Children	398
Chastisement of Children	401
Parent's Right to Services of Child	403
Seduction—Enticing Away Child	406
Torts by and Against Children	410
Property of Children	410
Contracts between Parent and Child	413

CHAPTER XIV.

BASTARDS.

Definition	415
Proof of Illegitimacy	417
Property Rights of Bastards	418
Contracts for Support	420
Bastardy Proceedings	421
Legitimation by Subsequent Marriage of Parents	425

CHAPTER XV.

ADOPTION OF CHILDREN.

Adoption at Common Law	429
Adoption Under the Statute	435

TABLE OF CONTENTS.

ix

CHAPTER XVI.

GUARDIAN AND WARD.

	PAGE
Guardians in Socage	444
Guardianship of Charitable Institutions	447
Guardians Appointed by Will or Deed	449
Guardian Appointed by the Court	457
Qualifications for Guardianship	470
Trust Companies as Guardians	472
Rights and Duties of Guardians	479
Termination of Guardianship	492
Accounting—Intermediate and Final	498
Guardian <i>Ad Litem</i> —Special Guardian	505

CHAPTER XVII.

MASTER AND SERVANT.

Apprentices	513
-------------------	-----

**THE LAW OF DOMESTIC RELATIONS IN
THE STATE OF NEW YORK.**

DOMESTIC RELATIONS.

CHAPTER I.

MARRIAGE: NATURE OF THE RELATION.

The word Marriage is used to denote first, the relation existing between a man and woman as husband and wife, and, second, the method by which that relation is assumed.

Marriage considered as the relation existing between husband and wife is a Status the rights and obligations of which are conferred and imposed by law irrespective of the wishes of the parties. But the assumption of the relation is a voluntary act. The consent of both parties is essential, and to this extent marriage is a contract. Once married, no agreement of the parties is effective to dissolve the relation.

While marriage is a contract to the extent that it must be founded upon an agreement of parties, when once established, it cannot be modified, restricted or enlarged or entirely released by consent of parties. Once contracted the law steps in and holds the parties to their various obligations and liabilities. *Maynard v. Hill*, 125 U. S. 211.

A sovereign may determine the Marital Status of its own citizens. In this country the power lies in the several states, not with the central government.

Marriage as creating the most important relation in life, as having more to do with the morals and civilization of the people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure

or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution. *Maynard v. Hill*, 125 U. S. 205.

Each state may determine the marital status of its citizens and prescribe the conditions upon which the marriage relation may be annulled or dissolved. *Mitchell v. Mitchell*, 63 Misc. Rep. 580; 117 N. Y. Supp. 671.

The states at the time of the adoption of the constitution possessed full jurisdiction of the subject of marriage and divorce. No power on these matters was delegated to the central government by the Federal Constitution and it has therefore no power to limit the right of a state to determine the marriage status of its own citizens under the full faith and credit clause of the Federal Constitution. *Haddock v. Haddock*, 201 U. S. 562.

The Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage or its dissolution in the states. *Andrews v. Andrews*, 188 U. S. 14.

So absolutely is the marriage relation within the control of the sovereign that the contract, if it be deemed such, can be annulled by subsequent legislation.

Legislation affecting the marriage relation or annulling that relation does not impair the obligations of a contract within the prohibition of the Federal Constitution. *Maynard v. Hill*, 125 U. S. 190.

See "Legislative Divorces" *post*, p. 36.

MARRIAGE AS A CONTRACT.

The New York statute is as follows:

Domestic Relations Law. § 10. Marriage a civil contract.
Marriage, so far as its validity in law is concerned, con-

tinues to be a civil contract, to which the consent of parties capable in law of making a contract is essential.

The statute speaks of marriage as a "civil" contract. While all contracts may be said to be civil obligations, it is intended to say that it is a contract within the control of the civil as distinguished from ecclesiastical authorities. The church and the ecclesiastical courts treated marriage as a sacrament as well as a contract, while the Council of Trent, whose authority was never recognized in England, decreed that a marriage to be valid must take place before a priest. But the control of the civil authority was always recognized in England. Says Blackstone: "Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law." 1 Bl. Com. 433.

While marriage is declared a civil contract for certain purposes, it is not thereby made synonymous with the word contract employed in the common law or statutes. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy for the benefit of the community. *Wade v. Kalbfleisch*, 58 N. Y. 282.

Justice Field, in the case of *Maynard v. Hill*, 125 U. S. 190, says: "Marriage is more than a mere contract. The consent of the parties is essential to its existence, but upon execution of the contract to marry by marriage, a relation is created between the parties which they cannot change. Other contracts may be modified or entirely released upon the consent of the parties. Not so with marriage. The relation once formed the law steps in and holds the parties to various

obligations and liabilities. It is an institution in the maintenance of which, in its purity, the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."

That marriage viewed solely as a civil contract possesses elements of contract is obvious. But it is also elemental that marriage, even considering it as only a civil contract, is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law and that it may not when once entered into be dissolved by mere consent of the parties. *Andrews v. Andrews*, 188 U. S. 14.

Under the law of this state marriage is a civil contract although questions of public policy are concerned in the regulation of the marital relation, and full and free consent of the parties is of the essence of this as of other contracts. Misrepresentations of a material fact made with the intention to induce another to make the marriage contract, without which he would not have done so, justifies an annulment. *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467.

The obligations of marriage do not exist by virtue of the contract, but are imposed by law and they can be neither modified nor changed by any agreement of the parties. *Maynard v. Hill*, 125 U. S. 211.

Marriage is more of a status than a contract and is subject to the control of the sovereignty under which the parties live. *Mitchell v. Mitchell*, 63 Misc. Rep. 580; 117 N. Y. Supp. 671.

As Marriage is a Status, it can exist only by virtue of an executed contract. A promise to marry in the future even if followed by sexual intercourse is not a marriage. Nor is the agreement one that the court will enforce specifically.

Such is the rule in this State.—A contract to marry, *per verba de futuro*, though followed by cohabitation does not amount to a marriage in fact. *Cheney v. Arnold*, 15 N. Y. 345.

Marriage is a civil contract, and like other contracts, it may, in terms and intent, be executory or executed. If executed, that is, if the parties agree, *eo instanti*, to take each other for husband and wife, it is of itself a marriage. If executory in its terms it would not, by any analogy

to common-law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in the future, and, viewed as an agreement to marry, it confessedly furnishes the basis of an action for damages. The court, in the case above ~~said~~^{says}, says: "Mutual promises to marry in future are executory, and whatever indiscretions the parties may commit after making such promises, they do not become husband and wife until they have actually given themselves to each other in that relation. That this has been the sense of the legal profession and of the courts is evident from the rules relating to several actions in common use. If a man seduce a woman under promise of marriage, an action for the seduction is allowed at the suit of the father, an action for the breach of the promise at the suit of the daughter. If a marriage existed by reason of a mutual engagement to be married at a future time, followed by intercourse, these actions would be absurdities, for the marriage being complete by the act complained of, there would be no seduction and no breach of promise."

And the rule is in conformity with the Civil law: "*Consensus, non concubitus, facit matrimonium.*" But nevertheless the ecclesiastical courts, assume to compel parties who had cohabited after an agreement to marry *per verba de futuro* to celebrate a marriage *in facie ecclesiae*. But after the enactment of Stat. 26 Geo II. c. 33, Blackstone writes: "These verbal contracts are now of no force to compel a future marriage." (1 Bl. Com. 439.)

Some jurisdictions still hold to the doctrine that a contract *per verba de futuro cum copula*, constitutes a marriage; and it is so stated by Kent, (2 Kent Com. 87) but, in logic, the *copula* at most can only be evidence of a subsequent fulfilment of the promise.

ACTION FOR BREACH OF PROMISE TO MARRY.

Although a promise to marry is not a marriage, certain liabilities result from a breach of the promise.

- (1) **An action on the breach may be maintained by the other party to recover damages.**
And if the promise was accompanied or followed by sexual intercourse.
- (2) **An action for seduction may be brought by the parent of the injured party, or**
- (3) **A criminal prosecution may be instituted.**

Although an action for breach of promise to marry is manifestly an action upon contract, it is usually treated as an action in tort. "The action for breach of contract to marry though in form an action of assumpsit, is in fact, and always has been since it was sustained at common law in respect to this question of damages really in the nature of an action for tort." *Thorn v. Knapp*, 42 N. Y. 474.

The fact that the action is in tort is shown by the following characteristics: Courts not of record are generally denied jurisdiction. *Fiero on Torts*, 374. The cause of action does not survive the death of the parties where the breach is not connected with any injury to property. *Wade v. Kalbfleisch*, 58 N. Y. 282; *Stebbins v. Palmer*, 1 Pick. 71; *Larocque v. Conheim*, 42 Misc. Rep. 613; 87 N. Y. Supp. 625. A claim confounded on breach of promise to marry cannot be transferred. *Pers. Prop. Law*, § 41. The defendant in such action is subject to arrest. *Code Civ. Proc.*, § 549. Punitive damages may be allowed in an action for breach of promise to marry. *Thorn v. Knapp*, 42 N. Y. 483. The above rules sufficiently indicate the nature of the action.

Of course, the action does not lie against a defendant who lacked capacity to contract. Thus infancy of the defendant is a defense. *Hunt v. Beake*, 5 Cow. 475; *Willard v. Stone*, 7 Cow. 22.

So too, a defendant is not liable if the plaintiff knew that he was married at the time of the contract and this is also true where the plaintiff knew that under a decree of divorce rendered against the defendant he was unable to marry in this state. *Haviland v. Halstead*, 34 N. Y. 643; *Williams v. Igel*, 62 Misc. Rep. 354; 116 N. Y. Supp. 778.

The action for breach of promise to marry is distinct from the action for seduction, as the latter cannot be brought by the woman. Nevertheless, seduction may be shown in aggravation of damages. *Wells v. Padgett*, 8 Barb. 323.

Seduction under promise to marry is made a crime by section 2175 of the Penal Law.

No attempt is here made to treat in detail an action for breach of promise to marry, as an action for tort is beyond the scope of this book. Merely the nature of the action is stated. The subject is fully treated in *Fiero on Torts*, 370.

As to seduction and the parent's action for damages and the criminal prosecution, see, *Parent and Child*, *post*. p. 406.

LAW OF PLACE OF CONTRACT GOVERNS.

While a State may determine the marital status of its own citizens, it is also the rule that the validity of a marriage is governed by the *lex loci contractus*.

In *Van Voorhis v. Brintnall*, 86 N. Y. 18, the rule is definitely stated that the validity of a marriage contract is to be determined by the law of the state where it was entered into. If valid there, it is to be recognized as such in the courts of this state, unless contrary to the prohibition of the natural law, or the express prohibitions of a statute. While every state can regulate the status of its own citizens, in the absence of express words, a legislative intent to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus* cannot be inferred; the intent must find clear and unmistakable expression in the statute.

A marriage if valid under the laws of the state where it was contracted, is valid here, and every right and privilege growing out of the relation so established attaches to each party thereto. *Thorp v. Thorp*, 90 N. Y. 602.

As a general rule, it may be stated that the validity of a marriage is to be determined by the *lex loci contractus*. *Smith v. Woodworth*, 44 Barb. 198. In the case of *Cropsey v. Ogden*, 11 N. Y. 228, it is

stated that by the universal practice of civilized nations the permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated.

Where a woman contracts a marriage in good faith not knowing that her husband has a former wife living and after her death the parties continue to live together as husband and wife in a jurisdiction where common law marriages are valid, the marriage cannot be questioned here.

Matter of Wells, 123 App. Div. 79; 108 N. Y. Supp. 164; *affd.* 194 N. Y. 548.

As to marriage by infants without consent of their parents in a state where such consent is not required, see *Everett v. Morrison*, 69 Hun, 146; 52 N. Y. St. Repr. 525; 23 N. Y. Supp. 377.

On this subject, see *Foreign Divorce*, *post*, p. 239; also *Bastards*, *post*, p. 415.

It seems that a marriage valid under the laws of the place of contract is valid here even though the parties sought the foreign jurisdiction in order to evade our laws.

In *Haviland v. Halstead*, 34 N. Y. 643, a person divorced, for adultery committed by himself in this state, promised to marry the plaintiff in New Jersey. He married another, and an action for the breach of this promise was brought in this state and failed. The parties resided in this state and contemplated the performance of the contract here. The court carefully distinguished the case so presented from one where a marriage had taken place in a foreign state. They assumed that the latter would be treated as valid, although the parties had gone there with the intent to evade the laws of this state. The doctrine in favor of the validity of a marriage so contracted is founded on principles of policy to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live.

Where the laws of another state do not prohibit a remarriage by a party divorced, its validity cannot be questioned in this state. *Moore v. Hegeman*, 92 N. Y. 521.

Where an American girl, in school in France, eloped with a citizen of the Argentine Republic, and went through a so-called marriage ceremony at Paris, which was not according to the formalities required by the laws of France, it was held that assuming that the formality of the marriage law of France did not apply to foreigners temporarily in that country, yet the Paris marriage was not valid as a common-law marriage in the absence of proof that the common law was, under such conditions, applicable in France so as to render valid a common-law marriage. The court will take judicial notice that the common law is not and never was in force in France. Assuming that such marriage was contracted at the Consulate it would not be valid unless performed according to the laws of the domicile of the contracting parties, and the facts did not justify a finding that the marriage at Paris was contracted according to the laws of the Argentine Republic, the domicile of the husband. *Matter of Hall*, 61 App. Div. 267; 70 N. Y. Supp. 406.

Some jurisdictions do not recognize the rule that the law of the place of contract governs—especially when there is an intent to avoid the law of the domicile.

Thus, in England the marriage of an English subject with his deceased wife's sister is invalid, although contracted in a country where such marriages are permitted. *Brook v. Brook*, 9 H. L. Cas. 193.

When a divorced husband left Pennsylvania to marry his paramour in another state where such marriages were permitted, the validity of the remarriage was not recognized, in Pennsylvania. *Stull's Estate*, 183 Pa. St. 625.

But a marriage valid at the place of contract will not be recognized as valid here if it be incestuous, polygamous, or prohibited by positive law.

These exceptions to the rule are recognized in *Van Voorhis v. Brintnall*, 86 N. Y. 18, citing *Wightman v. Wightman*, 4 Johns. Ch. 343. See also, 19 Am. and Eng. Enc. 1212.

CHAPTER II.

SOLEMNIZATION: COMMON LAW AND STATUTORY REQUIREMENTS.

At common law no formalities are necessary to a valid and binding marriage. A simple agreement per verba de praesenti is sufficient.

All that is essential to the validity of a marriage contract is the deliberate consent of competent parties entering into a present agreement to take each other for husband and wife. Such agreement may be proved like any other fact, either by positive evidence thereof, or by evidence from which it may be inferred. *Clayton v. Warwell*, 4 N. Y. 230.

It is well settled that a man and woman, without the presence of witnesses, without the intervention of minister or magistrate, by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves and to society as such. And if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgement and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was, in the beginning, an actual, *bona fide* and valid marriage. *Brinkley v. Brinkley*, 50 N. Y. 184, 198. See also *Gall v. Gall*, 114 N. Y. 109; *O'Gara v. Eisenlohr*, 38 Id. 296; *Caujolle v. Ferrie*, 23 Id. 90; *Fenton v. Reed*, 4 Johns. 52; *Van Buskirk v. Claw*, 18 Id. 346; *Rose v. Clark*, 8 Paige, 574; *Betsinger v. Chapman*, 88 N. Y. 487; *Badger v. Badger*, 88 Id. 546.

No particular mode of declaring or substantiating consent is prescribed or required by law. The essence of the contract, as of all contracts, is the consent of the parties; and its validity does not depend upon any form of celebration or upon the fact of cohabitation. *Hayes v. People*, 25 N. Y. 390, 397.

The case of *Bissell v. Bissell*, 55 Barb. 325, was where a man and woman being engaged to be married, the former stated to the latter that he did not believe in marriage ceremonies, and wished her to waive the ceremony saying that a marriage without it would be perfectly valid. She finally consented to waive any ceremony, and fixed a day for the marriage. On that day, while they were riding together in a carriage, he placed a ring upon her finger, saying: "This is your wedding ring; we are married." She received the ring as a wedding ring. He then said: "We are married, just as much as Charles is to his wife (referring to his brother and sister-in-law). I will live with you and take care of you all the days of my life, as my wife." She assented to this, and they went to a house where he had previously engaged board for "himself and wife," where they lived together as man and wife for about five weeks; he treating her as his wife, and addressing and speaking of her as such. This was held to constitute a valid marriage.

It is the agreement between a man and a woman to take each other as husband and wife that makes the marriage. Mere sexual relations no matter how long continued do not make a marriage, but may be evidence thereof.

Cohabitation and repute alone do not constitute a marriage. There must be an actual, provable agreement or contract to be husband and wife; mere living together as such is not sufficient; the agreement is an absolute and vital prerequisite to a valid marriage. This agreement can be proved by circumstantial evidence. The agreement may be established by the actions of the parties, their visible relations to each other and their representations to others. *Matter of Hamilton*, 76 Hun, 200; 57 N. Y. St. Repr. 510; 27 N. Y. Supp. 813.

Though a common-law marriage may be proved by cohabitation, reputation among friends and neighbors, and

mutual recognition by the parties of that relation, yet such facts do not, of themselves, constitute marriage, but are simply evidence of it. Evidence of this character sufficient to warrant a finding of marriage considered, and also as to when such evidence is inadmissible under section 829 of the Code. *Matter of Brush*, 25 App. Div. 610; 49 N. Y. Supp. 803.

In *Clayton v. Wardwell*, 4 N. Y. 230, 236, it is said that "mere reputation, when admissible at all, is always to be regarded as the weakest kind of evidence. It is never conclusive, except when it is general and supported by other evidence."

To establish a marriage from cohabitation and repute, the repute proper to be shown cannot go beyond the range of knowledge of the cohabitation; within the range, to contradict the repute of marriage, which to be effective must be general, a divided repute may be shown, that is, that among some friends and acquaintances the connection was reputed to be illicit, not matrimonial. *Badger v. Badger*, 88 N. Y. 546.

While an agreement to become husband and wife may, if not proven in express terms, by competent evidence, be established by proof of cohabitation, reputation among friends and neighbors, and mutual recognition by the parties of their occupying that relation, these facts do not, of themselves, constitute a marriage, but are simply evidence from which, if sufficiently strong, the courts may infer that the cohabitation was the result of a previous agreement to marry, and, from that fact, may infer that a marriage actually existed. *Matter of Brush*, 25 App. Div. 610; 49 N. Y. Supp. 803.

Matrimonial cohabitation raises the resumption of marriage which can only be repelled by the most cogent and satisfactory evidence. *Hynes v. McDermott*, 91 N. Y. 451. In *Gall v. Gall*, 114 N. Y. 109, 117, the court says: "The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less

strengt that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties. Where, however, the cohabitation is illicit in its origin, the presumption is that it so continues until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial. It is sufficient if the acts and declarations of the parties, their reputation as married people and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife." Citing *Caujolle v. Ferrie*, 23 N. Y. 90; *O'Gara v. Eisenlohr*, 38 Id. 296; *Badger v. Badger*, 88 Id. 546, 554; *Haynes v. McDermott*, 91 Id. 451, 457.

In *Davis v. Davis*, 7 Daly, 308, it appeared in an action for a divorce that the plaintiff, some time prior to her marriage with the defendant, went from her home in Texas in company with T., to the residence of an Indian preacher in the Indian Territory, and that he then performed a marriage ceremony, *per verba de præsenti* between them. It was held that the marriage was valid and barred the action for divorce, although the preacher was not regularly ordained as a minister; although they gave fictitious names to him; never cohabited as man and wife, and never were recognized as such among their friends and acquaintances, and although she intended that it should not be valid in certain contingencies.

Proof of matrimonial cohabitation, declarations of the parties and reputation that they are man and wife, is sufficient to found a presumption of marriage, and a prior marriage may thus be presumed, although there was a subsequent actual marriage between the parties. *Betsinger v. Chapman*, 88 N. Y. 487. But where there was neither a marriage ceremony, nor any contract of marriage between a man and woman, and no agreement to live together as husband and wife, but only an agreement to live together, the man never having held the woman out to the world as his wife, the general repute being to the contrary, the facts do not create a presumption, as a matter of law, that the marriage relation exists between the parties. *Soper v. Halsey*, 85 Hun, 464; 66 N. Y. St. Repr. 707; 33 N. Y. Supp. 105.

An illicit relation between man and woman is presumed to continue as such. It will never ripen into marriage, until the parties by a new agreement make the relation matrimonial.

To presume that there has been an actual marriage from the fact of cohabitation, it must be matrimonial and be so begun,

and not illicit. It is not the fact alone that raises the presumption, but the character of the fact. The parties must not only live together as do man and wife, but to become man and wife, there must be a purpose in beginning so to live, and they must hold themselves out to the world as so related. *Rose v. Clark*, 8 Paige, 574.

The courts will not, by testimony that is not clear and explicit, that is not general and supported by other circumstances, nor by reputation for marriage that is divided, raise such a presumption. *Clayton v. Wardwell*, 4 N. Y. 230.

In *Badger v. Badger*, 88 N. Y. 546, the only fact which seemed to place in doubt the character of the cohabitation, and to raise a question as to the legitimate inferences to be drawn therefrom, was the assumption of a false name by the alleged husband and his persistent silence among his own relatives. It was also claimed that the connection was originally illicit and must be presumed to retain that character until proof is given of a change in its object and purpose. The court said: "The rule that a connection, confessedly illicit in its origin, or shown to have been such, will be presumed to retain that character until some change is established is both logical and just. Very often the changed character of the cohabitation is indicated by the facts and circumstances which explain the cause and locate the period of the change, so that in spite of the illicit origin the subsequent intercourse is deemed matrimonial. (Citing *Fenton v. Reed*, 4 Johns. 52; *Rose v. Clark*, 8 Paige, 574; *Starr v. Peck*, 1 Hill, 270; *Jackson v. Claw*, 18 Johns. 346.) But a change may occur, and be satisfactorily established although the precise time or occasion cannot be clearly ascertained. If the facts show that there was or must have been a change, that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say when or exactly why the change occurred."

Meretricious cohabitation of a man and woman will not produce a presumption of the marriage relation, however long such cohabitation may continue. In the case of *Fagan*, 32 N. Y. State Repr. 995; 11 N. Y. Supp. 748, a cohabitation had continued for more than twenty years, which, in its origin, was undoubtedly meretricious. The court remarks: "Taking into consideration the manner in which the parties began to live together, the defendant's neglect to show her any of the attentions usual in married life, such as making calls or visits with her, and the separation of the plaintiff from the defendant's social surroundings and the occupations and interests of his daily life, I find it impossible to say that there was any time when the original adulterous connection changed into a matrimonial one."

If the cohabitation is meretricious in its origin, its continuance must be presumed until proof of a change and of marriage. In such a case marriage will not be presumed from cohabitation and reputation, but proof of a subsequent actual marriage is necessary. This may be shown by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and to satisfactorily prove that it was changed into that of actual marriage by mutual consent. *Bates v. Bates*, 7 Misc. Rep. 547; 57 N. Y. St. Rep. 725, 27 N. Y. Supp. 872 citing *Foster v. Hawley*, 8 Hun, 68; *Gall v. Gall*, 114 N. Y. 109; *Williams v. Williams*, 17 Abb. N. C. note p. 508.

Cohabitation and the declarations of the parties are *prima facie* evidence of marriage, but where, without any apparent rupture, the parties, after a cohabitation of two years, separated and continued separate, without any claims or pretensions on each other as husband and wife, the presumption of marriage arising from previous cohabitation will be rebutted. *Jackson v. Claw*, 18 Johns. 346.

Cohabitation alone is insufficient to raise the presumption of marriage. *Rose v. Clark*, 8 Paige, 574; *Clayton v. Wardell*, 4 N. Y. 230. Concubinage cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such a contract can only be proved by circumstances which exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of an actual marriage by mutual consent. *Foster v. Hawley*, 8 Hun, 68.

The cohabitation must be matrimonial. The general definition of "matrimonial cohabitation" is the living together of a man and woman, ostensibly as husband and wife. *Wilcox v. Wilcox*, 46 Hun, 32, 37, 10 N. Y. St. Repr. 746 citing *Bishop on Mar. and Div.*, § 777; *Pollock v. Pollock*, 71 N. Y. 137. This does not necessarily require the announcement further than it is given by the appearances of the purpose of the parties. The relationship must be shown by the manner in which the parties are living together.

Where the prior relation between the parties was a meretricious one,

a marriage will not be presumed from cohabitation and reputation. *Bates v. Bates*, 7 Misc. Repr. 547, 57 N. Y. St. Repr. 725, 27 N. Y. Supp. 872. In this case a writing signed by the alleged husband to the following effect: "This is to certify that 'plaintiff' is my true and beloved wife, whom I love, honor and cherish" was held insufficient to establish a common-law marriage, in view of testimony that showed it to be given as a cover for illicit intercourse, and the defendant himself denying the authenticity of the certificate.

The fact that a man and woman matrimonially cohabited for a number of years does not conclusively establish a marriage between them. It is but *prima facie* evidence and may be overcome by attendant circumstances which tend to show a purely meretricious relationship. If after the cohabitation the parties separate, and the man marries another woman, and no claim is ever made upon him by the woman from whom he separated, although the marriage was open and professed and knowledge of such marriage must have been brought to her attention, such cohabitation does not constitute a marriage. *Chamberlain v. Chamberlain*, 71 N. Y. 423. Judge Earl, in this case, states the facts as follows, and holds them ample to overcome the *prima facie* evidence of a matrimonial cohabitation between the parties: "Although she lived about fifty years after the separation, she never made any claims upon him as her husband. At the time of the separation she was still young, probably not more than thirty-five years old, and yet she did not obtain a divorce from him, although abundant grounds existed therefor, if she had been married to him. She was poor, became dependent upon her relations, and was a burthen upon them, yet no effort was made during her long life to compel him to contribute to her support. Although she survived him about eight years, she claimed no share in his property as his lawful widow. He was a pensioner, and after his death, if his lawful widow, she was entitled to a pension, and yet she never claimed any."

As to facts which will change a relation meretricious in its beginning into a marriage, see

Matter of Spink, 62 Misc. Rep. 158; 116 N. Y. Supp. 267.

A marriage originally void because the parties were incompetent to contract, may become valid where they continue the marital relation after the impediment is removed.

Where a woman having a common law husband marries another person by a ceremonial marriage and after the death of her former husband cohabits openly with the second husband for eighteen years, the relation becomes matrimonial

from the death of the first husband. *Geiger v. Ryan*, 123 App. Div. 722; 108 N. Y. Supp. 13. For facts establishing a common law marriage where a husband after the death of his wife continues to live with his mistress, see *Matter of Terwilliger*, 63 Misc. Rep. 479; 118 N. Y. Supp. 424.

A common law marriage cannot be made the basis of a prosecution for bigamy or an action for criminal conversation; for these actions a ceremonial or formal marriage is essential.

On actions for criminal conversation there must be evidence of a marriage in fact. Acknowledgment, cohabitation, and reputation are not sufficient. *Comyn's Digest*, Baron and Feme, B. 1.

In actions for criminal conversation an actual marriage must be proved. Cohabitation of the parties as man and wife, their declarations and admissions, the reputation of an existing marriage, the plaintiff's acknowledgement of the woman as his wife, holding her out as such to his friends and acquaintances, and her reception into his family as such are not sufficient to maintain the suit. A certificate of a justice of the peace which does not conform to the statute, and contains the statements required thereby cannot be admitted as evidence of a marriage for the purpose of bringing such an action. *Dann v. Kingdom*, 1 T. & C. 492. Direct proof of a ceremonial marriage is only necessary in prosecution for bigamy and actions for criminal conversation. In other cases it may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family and other circumstances. *Rockwell v. Tunnicliff*, 62 Barb. 408.

But it is immaterial whether the bigamous marriage be valid. Thus on an indictment for bigamy, it was held that to support the indictment it was immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or that either party was deceived

by his false representation of that character. It is no answer for the accused that, having a wife living and so incapable of a valid marriage, he did not intend or consent to a marriage in fact, but obtained the consent of the woman by fraudulently imposing upon her the form of marriage by a pretended clergyman. A married man, it seems, imagining himself to effect mere seduction, may blunder into bigamy. *Hayes v. People*, 25 N. Y. 390.

FORMALITIES OF MARRIAGE UNDER NEW YORK STATUTE.

A state in its sovereign power may always prescribe the requisites of a valid contract of marriage. (See ante, p.).

Prior to January 1, 1902, the statutes of this state while regulating ceremonial marriages did not require a ceremony and full freedom to contract the so-called common law marriage obtained. But chapter 339 of the Laws of 1901. governing the manner in which a marriage must be solemnized provided that in addition to solemnization before a clergyman or magistrate, parties could marry by a written contract, of which the formalities were prescribed. But still more important that statute added the following section (then numbered 19) to the Domestic Relations Law.

No marriage claimed to have been contracted on or after the first day of January, nineteen hundred and two, within this state, otherwise than in this article provided, shall be valid for any purpose whatever, provided, however, that such marriage, shall be deemed or adjudged to be invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person solemnizing the same under subdivision one, two, three and four of section eleven of this article, if consummated with a full belief on the part of the persons so married, or either of them, that they were lawfully joined in marriage, or on

account of any mistake in the date or place of marriage or in the residence of either of the parties in case of a marriage solemnized under subdivision four of said section eleven.

The evident effect of this enactment was to make it impossible to contract a valid common law marriage in this state after the date named. This situation continued until a portion of the Domestic Relations Law was revised by chapter 742 of the Laws of 1907, to take effect January 1, 1908. This statute required a license to be obtained as a prerequisite to the solemnization of the marriage and moreover section 6 of the statute repealed section 19 of the former statute (given *supra*) and since that time there is no enactment providing that marriages in this state must be celebrated in the ways prescribed by the statute. We must note, however, that the statute of 1907 as well as the present statute, in section 11, states that "The marriage *must* be solemnized" in certain ways thereafter prescribed. It is questionable whether the use of the word "must" will be construed so as to exclude all methods of marriage other than those prescribed. The former section 11 as it appears in chapter 272 of the Laws of 1896 at which period the right of common law marriage existed stated "For the purpose of being registered and authenticated as prescribed by this article a marriage *must* be solemnized by either" certain ministers and officials named.

There is nothing in the present statute to indicate the intention of the legislature in regard to common law marriages except the very significant fact that the former statute expressly limiting the methods of contracting a valid marriage to those prescribed in the statute has been expressly repealed.

The statute provides for the solemnization of marriage in the following ways:

- (1) By ministers of religion.
- (2) By certain judges and public officers.
- (3) By a written contract.

No particular form of ceremony is required, but there must be at least one witness when the ceremony is before a minister or magistrate; and at least two witnesses to a written contract which must also be acknowledged.

Domestic Relations Law. § 11. By whom a marriage must be solemnized.

The marriage must be solemnized by either:

1. *A clergyman or minister of any religion, or by the leader, or either of the two assistant leaders, of the society for ethical culture in the city of New York;*

2. *A mayor, recorder, alderman, city magistrate, police justice or police magistrate of a city, except that in cities which contain more than one hundred thousand and less than one million inhabitants, a marriage shall be solemnized by the mayor, or police justice, and by no other officer of such city, except as provided in subdivisions one and three of this section;*

3. *A justice or judge of a court of record, or of a municipal court, or a justice of the peace; except that justices of the peace in cities which contain more than one hundred thousand and less than one million inhabitants, shall have no power to solemnize marriages; or,*

4. *A written contract of marriage signed by both parties and at least two witnesses who shall subscribe the same, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded, provided, however, that all such contracts of marriage must in order to be valid be acknowledged before a judge of a court of record. Such contract shall be recorded within six months after its execution in the office of the clerk of the county in which the marriage was solemnized.*

The word "clergyman," when used in the following sec-

tions of this article, includes each person referred to in the first subdivision of this section. The word "magistrate," when so used, includes any person referred to in the second or third subdivision.

Domestic Relations Laws. § 12. Marriage, how solemnized.

No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.

The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practised in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.

Where a contract of marriage was not filed within six months, but prior to the expiration of that period the statute declaring the marriage void for failure to file the contract was repealed, the marriage is not void though possibly voidable. *Kahn v. Kahn*, 60 Misc. Rep. 334; 113 N. Y. Supp. 256. A contract of marriage properly executed is not void by reason of a failure to file the same. *Kahn v. Kahn*, 62 Misc. Rep. 550; 115 N. Y. Supp. 1028.

Persons intending to marry in this state whether by ceremony or contract must procure a marriage license and present it to the person who is to officiate. If the minister or magistrate solemnize the marriage without the presentation of a license, he is guilty of a misdemeanor. But the marriage itself is not invalid by reason of a failure to obtain a license.

Domestic Relations Law. § 13. Marriage licenses.

It shall be necessary for all persons intending to be married to obtain a marriage license from the town or city clerk of the town or city in which the woman to be married resides and to deliver said license to the clergyman or magistrate who is to officiate before the marriage can be performed. If the woman or both parties to be married are nonresidents of the state such license shall be obtained from the clerk of the town or city in which the marriage is to be performed.

Domestic Relations Law. § 25. License, when to be obtained.

The provisions of this article pertaining to the granting of the licenses before a marriage can be lawfully celebrated apply to all persons who assume the marriage relation in accordance with subdivision four of section eleven of this chapter. Nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age nor to render void any marriage between minors or with a minor under the legal age of consent where the consent of parent or guardian has been given and such marriage shall be for such cause voidable only as to minors or a minor upon complaint of such minors or minor or of the parent or guardian thereof.

Domestic Relations Law. § 16. False statements and affidavits.

Any person who shall in any affidavit or statement required or provided for in this article wilfully and falsely swear in regard to any material fact as to the competency of any person for whose marriage the license in question or concerning the procuring or issuing of which such affidavit or statement may be made shall be deemed guilty of perjury and on conviction thereof shall be punished as provided by the statutes of this state.

Domestic Relations Law. § 17. Clergyman or officer violating article ; penalty.

If any clergyman or other person authorized by the laws of this state to perform marriage ceremonies shall solemnize or presume to solemnize any marriage between any parties without a license being presented to him or them as herein provided or with knowledge that either party is legally incompetent to contract matrimony as is provided for in this article he shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not less than fifty dollars nor more than five hundred dollars or by imprisonment for a term not exceeding one year.

Domestic Relations Law. § 18. Clergymen or officer, when protected.

Any such clergymen or officer as aforesaid to whom any such license duly issued may come and not having personal knowledge of the incompetency of either party therein named to contract matrimony, may lawfully solemnize matrimony between them.

The Penal Law also makes it a misdemeanor to solemnize an unlawful marriage or to unlawfully assume to grant a divorce.

Penal Law. § 1450.

A minister or magistrate who solemnizes a marriage when either of the parties is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which within his knowledge a legal impediment exists, is guilty of a misdemeanor. Until a marriage has been dissolved or annulled by a proper tribunal or court of competent jurisdiction, any person who shall assume to grant a divorce, in writing, purporting to divorce husband and wife and permitting them or either of them to lawfully marry again, shall be guilty of a mis-

demeanor punishable by fine for the first offense not exceeding five hundred dollars, and for the second offense one thousand dollars, or imprisonment not exceeding one year, or both such fine and imprisonment.

The object of statutes requiring a marriage license or a publication of the banns is to prevent clandestine or ill-considered marriages. They do not, in most cases, render an unlicensed marriage void.

Acts requiring a marriage license are probably intended to serve the same purpose as the English acts requiring the publication of banns—that is to say, to prevent clandestine and ill-considered marriages. The early English acts requiring the publication of banns did not render the marriage invalid for a failure to do so, but usually imposed a severe penalty upon the person celebrating a marriage if the banns had not been published. And similiar penalties were imposed for marrying minors without the consent of parents.

The first English act making such marriages absolutely void was Lord Hardwicke's act, 26 Geo. II. c. 33. Of this Blackstone says: "Much may be and much has been said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are ever a terrible inconvenience to those private families wherein they happen. On the other hand, the restraints upon marriages, especially among the lower class, are evidently detrimental to the public by hindering the increase of the people; and to religion and morality by encouraging licentiousness and debauchery among the single of both sexes." (1 Bl. Com. 438). Chitty in his note on the above passage says: "The commentator's profound observation as to this effect of those restraints put upon marriage has been and is amply confirmed * * * and the immediate consequence was a very general disregard indeed of the marriage rite altogether. Within a year the

act was given up * * * leaving publication of the banns nearly upon the former footing."

The evil resulting from invalidating marriages because of technical defects in the ceremony was proved by experience and while the subsequent statute, 4 George IV. c. 16, punishes clandestine marriages by loss of property, etc., it does not make such marriages void. "It, therefore, abounds in provisions for securing an assurance before marriage that the parties are of proper age and have proper consent and with punishments where such provisions are broken through, but these irregularities are not allowed to avoid the marriage when solemnized." (1 Bl. Com. 438—Coleridge's Note.)

The New York statute has expressly provided that the failure to procure a license shall not make a marriage void, though it imposes penalties upon the official celebrating the marriage without a license. This is the general rule. "The statutes requiring the issuance of a marriage license prior to the ceremony of marriage are directory merely and in the absence of any express declaration that a marriage without a license shall be void, it is primarily held that such marriage is valid." (19 Am. & Eng. Enc., 1191).

Statutory provisions as to form of licenses, duties of town and city clerks, records, etc.

Domestic Relations Law. § 14. Town and city clerks to issue marriage licenses; form.

The town or city clerk of each and every town or city in this state is hereby empowered to issue marriage licenses to any parties applying for the same who may be entitled under the laws of this state to contract matrimony, authorizing the marriage of such parties, which license shall be substantially in the following form:

STATE OF NEW YORK,

County of

City or town of

Know all men by this certificate that any person authorized by law to perform marriage ceremonies within the state of New York to whom this may come, he, not knowing any lawful impediment thereto, is hereby authorized and empowered to solemnize the rites of matrimony between of in the county of and state of New York and of in the county of and state of New York and to certify the same to be said parties or either of them under his hand and seal in his ministerial or official capacity and thereupon he is required to return his certificate in the form hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said town or city at this day of nineteen Seal.

The form of the certificate annexed to said license and therein referred to shall be as follows:

I, a residing at in the county of and state of New York do hereby certify that I did on this day of in the year A. D., 19.., solemnize the rites of matrimony between of in the county of and state of New York and of in the county of and state of New York in the presence of and as witness and the license therefor is hereto annexed.

Witness my hand at in the county of this day of, A. D., 19.. In the presence of

The license issued and the certificate duly signed by the person who shall have solemnized the marriage therein au-

thorized shall be returned by him to the office of the town or city clerk who issued the same on or before the tenth day of the month next succeeding the date of the solemnizing of the marriage therein authorized and any person or persons who shall wilfully neglect to make such return within the time above required shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars or more than fifty dollars for each and every offense.

Domestic Relations Law. § 15. Duty of town and city clerks.

It shall be the duty of the town or city clerk when an application for a marriage license is made to him to require each of the contracting parties to sign and verify a statement or affidavit before such clerk or one of his deputies, containing the following information. From the groom: Full name of husband, color, place of residence, age, occupation, place of birth, name of father, country of birth, maiden name of mother, country of birth, number of marriage. From the bride: Full name of bride, place of residence, color, age, occupation, place of birth, name of father, country of birth, maiden name of mother, country of birth, number of marriage. The said clerk shall also embody in the statement, if either or both of the applicants have been previously married, a statement as to whether the former husband or husbands or the former wife or wives of the respective applicants are living or dead and as to whether either or both of said applicants are divorced persons, if so when and where the divorce or divorces were granted and shall also embody therein a statement that no legal impediment exists as to the right of each of the applicants to enter into the marriage state. The town or city clerk is hereby given full power and authority to administer oaths and may require the applicants to produce witnesses to identify them or either of them and may also examine under oath or otherwise other witnesses as to any material inquiry pertaining to the issuing of the license. If it appears from the affidavits and statements so taken, that the persons for whose

marriage the license in question is demanded are legally competent to marry the said clerk shall issue such license, except in the following cases. If it shall appear upon an application of the applicants as provided in this section that the man is under twenty-one years of age or that the woman is under the age of eighteen years, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead then the written consent of the guardian or guardians of such minor or minors. If there is no parent or guardian of the minor or minors living to their knowledge then the town or city clerk shall require the written consent to the marriage of the person under whose care or government the minor or minors may be before a license shall be issued. The parents, guardians or other persons whose consents it shall be necessary to obtain before the license shall issue, shall personally appear before the town or city clerk and execute the same if they are residents of the state of New York and physically able so to do. If they are non-residents of the state the required consents may be executed and duly acknowledged without the state but the consent with a certificate attached showing the authority of the officer to take acknowledgments must be duly filed with the town or city clerk before a license shall issue. Before issuing any license herein provided for, the town or city clerk shall be entitled to a fee of one dollar which sum shall be paid by the applicants before or at the time the license is issued; and all such fees so received by the clerks of cities shall be paid monthly to the treasurer of the city wherein such license is issued. Any town or city clerk who shall issue a license to marry any persons one or both of whom shall not be at the time of the marriage under such license legally competent to marry without first requiring the parties to such marriage to make such affidavits and statements or who shall not require the procuring of the consents provided for by this article, which shall show that the parties authorized by said license to be married are legally

competent to marry shall be guilty of a misdemeanor and on conviction thereof shall be fined in the sum of one hundred dollars for each and every offense. In any city the fees collected for the issuing of a marriage license, or for solemnizing a marriage, so far as collected for services rendered by any officer or employee of such city, shall be paid into the city treasury and may by ordinance be credited to any fund therein designated, and said ordinance, when duly enacted, shall have the force of law in such city.

Domestic Relations Law. § 19. Records to be kept by town and city clerks.

Each town and city clerk hereby empowered to issue marriage licenses shall keep a book in which he shall record and index all affidavits, statements, consents and licenses together with the certificate attached showing the performance of the marriage ceremony which book shall be kept and preserved as a part of the public records of his office. On or before the fifteenth day of each month the said town and city clerk shall file in the office of the county clerk of the county in which said town or city is situated the original of each affidavit, statement, consent, license and certificate, which have been filed with or made before him during the preceding month. He shall not be required to file any of said documents until the license is returned with the certificate showing that the marriage to which they refer has been actually performed.

Domestic Relations Law. § 20. Records to be kept by the county clerk.

The county clerk of each county shall record and index in a book kept in his office for that purpose each statement, affidavit, consent and license together with the certificate thereto attached showing the performance of the marriage ceremony filed in his office. During the first twenty days of the month of January, April, July and October of each year the county clerk shall transmit to the state department

of health of Albany, New York, a copy of all affidavits, statements, consents and licenses with certificates attached filed in his office during the three months preceding the date of said report, also copies of all contracts of marriage made and recorded in his office during said period entered into in accordance with subdivision four of section eleven of this chapter, which said record shall be kept on file and properly indexed by the state department of health. The services rendered by the county clerk in carrying out the provisions of this article shall be a county charge except in counties where the county clerk is a salaried officer in which case they shall be a part of the duties of his office.

Domestic Relations Law. § 21. Forms and books to be furnished.

Blank forms for marriage licenses and certificates and also the proper books for registration ruled for the items contained in said forms and also blank statements and affidavits and such other blanks as shall be necessary to comply with the provisions of this article shall be prepared by the state board of health and shall be furnished by said department at the expense of the state to the county clerks of the various counties of the state in the quantities needed from time to time, and the county clerk of each county shall distribute them to town and city clerks in his county in such quantities as their necessities shall require. The expense of distributing the same to said town and city clerks is hereby made a county charge.

Domestic Relations Law. § 22. Penalty for violation.

Any town, city or county clerk who shall violate any of the provisions of this article or shall fail to comply therewith shall be deemed guilty of a misdemeanor and shall pay a fine not exceeding the sum of one hundred dollars on conviction thereof.

Marriage certificates and records of marriage are presumptive evidence of marriage.

Domestic Relations Law. § 23. Presumptive evidence.

Copies of the records of marriages including the license and certificate of marriage and all other records pertaining thereto duly certified by the clerk of the county where the same are recorded under his official seal shall be evidence in all courts.

Code Civil Procedure § 928.

An original certificate of a marriage, within the state, made by the minister or magistrate by whom it was solemnized, the original entry thereof, made, pursuant to law, in the office of a clerk of a city or town within the state; or a copy of the certificate, or of the entry, duly certified, is presumptive evidence of the marriage.

Church registers of marriage are *prima facie* evidence of marriages entered therein and of the time when they occurred, without reference to any law declaring them to be evidence. It is no objection to the admission of such a register that it was the practice for each minister of the parish to keep an account of the marriages solemnized by him, in a book kept by himself, as the marriages occurred, or soon after, and to hand in a memorandum of them to the rector, on a slip of paper from which they were entered in the register by the rector. In such a case the register only, and not the original book of entry, is admissible. *Maxwell v. Chapman*, 8 Barb. 579, citing 1 Greenleaf Ev., 483, 484, 493; *Jackson v. King*, 5 Cow. 237. In *Degnan v. Degnan*, 43 N. Y. St. Repr. 646; 17 N. Y. Supp. 883, it was held that proof by a foreign parish register, while competent, is not the best evidence, especially where it is not shown that the law required such registry.

A memorandum purporting to be a record of marriage, but which is not signed and gives no names of witnesses to the ceremony, and does not state that the persons named therein as being married were

known to the minister as the persons therein mentioned, cannot be admitted in evidence. *Matter of Molter*, 22 Week. Dig. 507 Although a marriage certificate is not made in conformity to the statute, in omitting particulars required to be stated, still if it is an original certificate given at the time of the marriage in the presence of the parties, it is competent at common law as part of the *res gestæ*. *Wingate v. Haskins*, 20 Week. Dig. 438.

CHAPTER III.

MATRIMONIAL ACTIONS—JURISDICTION—HISTORICAL REVIEW.

There are three matrimonial actions affecting the marriage tie :

- (1) **Action for annulment, which proceeds upon the theory that the initial contract was void or voidable.**
- (2) **Action for absolute divorce, in which a marriage tie originally valid, is severed because of some wrongful act committed by the defendant. On decree rendered the parties are no longer husband and wife.**
- (3) **Action for separation, limited divorce, or divorce from bed and board, which modifies the obligation of the parties to a valid marriage, but does not sever the marital relation.**

The Spiritual Courts of England, which alone had jurisdiction of matrimonial causes, granted only annulments (then called divorce a vinculo) and limited divorces (divorce a mensa et thoro). They entertained also some minor actions affecting the marital relation unknown in this state.

The action for absolute divorce is wholly a creation of statute, both in England and in this country.

Divorce under Roman Law.

In early Roman Law the husband had a power to repudiate his wife without judicial decree. It is said, however, that as early as the time of Romulus the state asserted its interest in the permanence of marriage by forbidding the repudiation of wives unless they were guilty of adultery or of drinking wine on the pain of forfeiture of the whole of the offender's property. But divorce was allowed by the law of the Twelve Tables, with great freedom. Subsequently the Lex Julia allowed either party to divorce the other though certain restrictions were imposed. A written bill of

divorce had to be given in the presence of seven witnesses and the divorce be publicly registered. But it was purely an act of parties without judicial interference. 27 Enc. Brit. 472.

Influence of christianity.

On the growth of Christianity and as its influence increased, the whole conception of the nature of marriage changed. Marriage was viewed by the Church as a sacrament and the right to divorce so far as recognized was founded upon the words of Christ as found in 5 Matt. 31: "Whosoever shall put away his wife, save for the cause of fornication causeth her to commit adultery; whosoever shall marry her that is divorced shall commit adultery." The whole discussion centered about the interpretation to be given to the word "fornication." The scholars of the Church of Rome restricted the meaning to antenuptial incontinence concealed from the husband and excluded adultery subsequent to the marriage. Hence, that Church stood firmly upon the ground that a marriage once valid is absolutely indissoluble the annulment upon the grounds of concealed antenuptial fornication being founded upon fraud which made the original contract void.

The Christian conception of the marriage relation lay at the basis of the Justinian Law. Marriages by mutual consent were prohibited except (1) where the husband was impotent; (2) where either husband or wife desired to enter a monastery and (3) where either of them was in captivity for a certain length of time. The prohibition or divorce by consent was repealed by Justin, the successor of Justinian. "He yielded," says Gibbon, "to the prayers of his unhappy subjects and restored the liberty of divorce by mutual consent."

Under the Canon Law of Rome there could be no divorce

a vinculo matrimonii but only *a mensa et thoro*, but on this matter the Eastern and Western churches were divided. But we read "The church, however, always assumed to itself the right to grant license for an absolute divorce and further by claiming the power to declare marriages null and void, though professedly this could be done only in cases where the original contract could be said to be void, it was and is to this day undoubtedly extended in practice to cases in which it is impossible to suppose the original contract really void, but in which a complete divorce is on other grounds desirable." 27 Enc. Brit. 474.

Canon law as administered by the spiritual courts of England.

The English Law of divorce was based on the Canon Law and administered by the ecclesiastical courts. These courts in addition to annulling marriages for defects in the original contract (then called divorce *a vinculo*) and divorce *a mensa et thoro*, the limited divorce or separation which did not dissolve the bonds of matrimony, entertained also several other matrimonial actions. Thus the court could prevent an actual separation between husband and wife and compel one spouse to return to the other by a suit for restitution of conjugal rights. 3 Bl. Com. 94.

"Another species of matrimonial causes was when a party contracted to another, brought a suit in the ecclesiastical courts to compel a celebration of the marriage in pursuance of such contract; but this branch of causes is now cut off entirely by the act preventing clandestine marriages (26 Geo. II. c. 33) which enacts that for the future no suit shall be had in any ecclesiastical court to compel a celebration of marriage *in facie ecclesiae* for or because of any contract of matrimony whatsoever." 3 Bl. Com. 93.

The ecclesiastical courts would also declare a marriage void for precontract of one of the parties "so no one pre-

contracted to any ought to marry another; for the contract makes the marriage if espousals afterwards ensue, for they have relation to the first contract and void all mesne acts." Comyns, Baron and Feme, B 3. "A divorce will be a *vinculo* when the husband or wife was pre-contracted to another." Id. C. 1.

But by the statute (32 Hen. VIII, c. 38) all impediments arising from pre-contracts to other persons were abolished and declared of none effect unless they had been consummated with bodily knowledge in which case the Canon Law holds such contract to be a marriage *de facto*. This statute was repealed but the act of 26 Geo. II. c. 33, prohibited all suits in ecclesiastical courts to compel a marriage in consequence of any contract. 1 Bl. Com. 435.

The ecclesiastical courts also entertained a suit for jactitation of marriage in which the defendant could be enjoined from falsely asserting that he was married to the plaintiff. 3 Bl. Com. 93.

The ecclesiastical courts did not deal with the custody of the children of the marriage on granting a divorce, leaving that matter to be determined by the common law rights of the father or by the intervention of the court of chancery. 27 Enc. Brit. 475.

But the clergy, themselves vowed to celibacy and thus, doubtless, removed from all prejudice in the matter, stood resolutely for the indissolubility of the marriage tie. "For the Canon Law, which the common law follows in this case deems so highly and with such mysterious reverence of the nuptial tie that it will not allow it to be unloosened for any cause whatsoever that arises after the union is made." 1 Bl. Com. 441.

LEGISLATIVE DIVORCES.

Although the Spiritual Courts did not admit of absolute divorce, Parliament, by special act was accustomed to grant

divorces after a hearing and the establishment of certain conditions precedent.

The legislatures of the several states of the union have similar power, unless restricted by some constitutional provision.

There was no English statute permitting an action for absolute divorce until 1857, but prior to that time divorces were granted by act of Parliament. As a prerequisite to such legislation the application had to show a successful suit in the ecclesiastical courts resulting in a decree of divorce *a mensa et thoro*, and, the husband being the applicant, a successful action at common law and a recovery of damages against the paramour. 27 Enc. Brit. 476.

This authority says "It is obvious that the necessity of occasional proceedings before the House or Parliament imposes great hardship on the mass of the population" and cites the charge of Mr. Justice Maule to one who was convicted of bigamy by a remarriage after his wife had deserted him with her paramour. "You have been convicted of the offence of bigamy. . . . It is true that she (your former wife) has deserted you and is living in adultery with another man. . . . You, however, also acted under a very serious misapprehension of the course which you ought to have pursued. You should have gone to the ecclesiastical court and there obtained against your wife a decree *a mensa et thoro*. You should then have brought an action in the courts of common law and recovered, as no doubt you would have recovered, damages against your wife's paramour. Armed with these decrees you should have approached the legislature and obtained an act of Parliament which would have rendered you free and legally competent to marry her whom you have taken on yourself to marry with no such sanction. It is quite true that these proceedings would have cost you many hundreds of pounds, whereas you probably have not as many pence. But the law knows no distinction between rich and poor. The sentence of the court upon you therefore is that you be imprisoned for one day."

Speaking of the power of the legislature to grant divorce the Supreme Court of the United States says: "When this country was settled, the power to grant a divorce from the bond of matrimony was exercised by the Parliament of England. The ecclesiastical courts of that country were limited to the granting of divorce from bed and board. Naturally the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted with few exceptions in all the states. *Maynard v. Hill*, 125 U. S. 206.

In *Stone v. Pease*, 8 Conn. 541, it was held that the courts cannot impeach a legislative divorce except upon the ground of unconstitutionality and the power to grant such divorces is not prohibited either by the Federal constitution or by that of the state of Connecticut.

For many years after New York became an independent state there was not any legal mode of dissolving a marriage in the lifetime of the parties, but by a special act of the Legislature. 2 *Kent's Commentaries*, 197.

The granting of divorce from the bonds of matrimony was not confided to the courts of England and from the earliest days, the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases. *Cooley on Constitutional Limitations*, [7th ed.] 153.

The Supreme Court of the United States has held that the legislature of the former territory of Oregon had power to grant a divorce and that the courts cannot inquire into the motives of the legislature in so doing. *Maynard v. Hill*, 125 U. S. 209.

Legislative divorces in New York.

The colony of New York never had any court possessing jurisdiction of matrimonial causes, or power to grant divorces. No statute defining causes of divorce or authorizing divorce in any case whatever was ever enacted by the legislature of the colony. Some special applications were made to the colonial legislature; but all such applications were refused. Chancellor Sandford, in the case of *Burtis v. Burtis*, 1 Hopk. Ch. 557, says: "According to all the information which I can obtain from records or otherwise, it appears that

no divorce took place in the colony of New York during more than one hundred years preceding the time when the colony became a state, and that the only divorces which ever took place in the colony were the four granted by Governor Lovelace in 1670 and 1672. Thus it appears that the law of England concerning divorces and matrimonial causes was never adopted in the colony of New York. It was not adopted in fact or in practice and it was never the law of the colony."

The first statute permitting actions for absolute divorce in the state of New York was passed in 1787. The first English act allowing such action was passed in 1857.

Prior to the year 1787, the courts of this state had no jurisdiction of the subject of divorce, and the only remedy of aggrieved individuals in matrimonial cases was by application to the colonial governor and his council or to the legislature for relief. In that year an act was passed authorizing the Court of Chancery to entertain proceedings, and when the fact was made to appear, to decree divorce for adultery. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, citing *Burtis v. Burtis*, 1 Hopk. 557; *Griffin v. Griffin*, 47 N. Y. 134, 138. In this case it is stated that the courts in this State have no common law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute.

In *Griffin v. Griffin*, 47 N. Y. 134, it is stated: "Prior to 1787, there was no tribunal in this state authorized to grant a divorce, and the only remedy of aggrieved individuals in matrimonial cases was by application to the legislature for relief. In 1787 an act was passed reciting that it was more advisable for the legislature to make general provisions for such cases, than to afford relief to individuals without a proper trial, and therefore conferring jurisdiction upon the Court of Chancery to decree divorces in cases of adultery. This was the only cause of divorce until the year 1813, when divorces, on the application of the wife, on the ground of cruel treatment, was authorized, and in 1824 the husband was enabled to sue for a divorce on the same ground."

The English act of 1857 providing for divorce erected a new court, "The court for divorce and matrimonial causes," to which was transferred all the powers of the ecclesiastical courts as well as the powers previously exercised by Parliament. Under this act the husband can obtain a divorce for adultery while the wife can only obtain such divorce for adultery, coupled with cruelty or desertion for two or more years, and also for incestuous or bigamous adultery or rape or unnatural offences. This act also compelled the husband to join the defendant's paramour in the suit and damages may be recovered against him while he may be ordered to pay costs, though the latter provision is said to be curtailed by recent decisions. This act also allowed clergymen to refuse to remarry divorced persons where they had conscientious scruples against doing so. 27 Enc. Brit. 478.

By an act of 1895, Parliament allowed the wife to maintain summary proceedings for a separation under certain circumstances though such summary relief cannot be given to the husband. 27 Enc. Brit. 479.

The jurisdiction of the courts of the State of New York in matrimonial actions is wholly statutory.

But the Court of Chancery, independently of statutory authority, has annulled marriages on the ground of fraud or lunacy under its inherent jurisdiction over contracts tainted with such vice.

It is probable therefore that in questions of jurisdiction a distinction should be made between actions for annulment and for divorce.

The ecclesiastical law of England did not, on the adoption of the constitution, become the law of this state; but the decisions rendered by the Spiritual Courts may, nevertheless, be considered and followed.

The courts have no common law jurisdiction in matrimonial actions, but only that conferred by the statute and such as is incidental to the express powers conferred. Durham

v. Durham, 99 App. Div. 450; 91 N. Y. Supp. 450. The courts of this state have only statutory authority to grant divorce, to award alimony or to modify the same; they have no inherent jurisdiction. *Goodsell v. Goodsell*, 82 App. Div. 65; 81 N. Y. Supp. 806.

The Supreme Court has no inherent power to declare a marriage contract void. Neither has it inherent power to decree a limited or absolute divorce. The common-law courts, or a Court of Chancery in England, never possessed it. Whatever power, therefore, is possessed is given by statute. The court can exercise no power on the subject of divorce, except what is expressly specified in the statute. *Peugnet v. Phelps*, 48 Barb. 566. It therefore follows that no action can be maintained to procure a judgment annulling a marriage, except for the causes specified in the sections of the Code. See also *Wightman v. Wightman*, 4 Johns Ch. 343; *Ferlat v. Gojon*, 1 Hopk. 478; *Burtis v. Burtis*, 1 Hopk. 557.

In *Palmer v. Palmer*, 1 Paige, 276, it was held that the Chancery Court, to whose jurisdiction the Supreme Court has succeeded, had no power even with the consent of the parties to decree an absolute or partial dissolution of the marriage contract, except in the special cases provided for by statute.

In *Jones v. Jones*, 90 Hun, 414; 70 N. Y. St. Repr. 319; 35 N. Y. Supp. 877, it was contended, as in the case of *Burtis v. Burtis*, *supra*, that the ecclesiastical law of England, so far as it related to the subject of divorce, became a part of its common law, and was therefore, by the Constitution of 1777, made a part of the law of the state, subject, nevertheless, to such alterations as the legislature should make. The court followed the case of *Burtis v. Burtis*, and held that the ecclesiastical law of England relative to divorce was never adopted in this state, and that the statutes of this state are original regulations.

It is well settled that the courts of this state have no common-law jurisdiction over the subject of divorces, and that their authority is confined to the exercise of such express and incidental powers as are conferred by statute. *Chamberlain v. Chamberlain*, 63 Hun, 96; 43 N. Y. St. Repr. 502; 17 N. Y. Supp. 578. See also *Peugnet v. Phelps*, 48 Barb. 566; *Blanc v. Blanc*, 67 Hun, 384; 51 N. Y. St. Repr. 822; 22 N. Y. Supp. 264. The qualifications of a husband or wife to bring an action for divorce in this state, and the grounds upon which a decree may be pronounced are matters of positive legislation. *Dickinson v. Dickinson*, 63 Hun, 516; 18 N. Y. Supp. 485.

The Court of Chancery in this state early asserted its power to annul a marriage induced by fraud under its general jurisdiction to vacate all contracts procured by fraud, even though in England such jurisdiction was lodged in the ecclesiastical or spiritual courts. *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467. Speaking of the jurisdiction and principles moving the court in actions to annul a marriage, *Rapallo*, J. writes: "Yet it has been the constant practice of the Court of Chancery both before and since the Revised Statutes to make equitable provision for all these matters and in doing so, it has been guided by the decisions of the Ecclesiastical courts of England in similar cases. This has not been done upon the theory that the Court of Chancery of this state was vested with the jurisdiction of the Ecclesiastical courts of England in matrimonial cases or that * * * it ever possessed any jurisdiction in cases of divorce other than that which was conferred by our own statutes; but upon the ground of the general equitable jurisdiction of the court, and also that when our statutes did confer jurisdiction upon the Court of Chancery in those cases for divorce which by the English law are solely cognizable in the Ecclesiastical courts, the grant of that jurisdiction carried with it by implication the incidental powers which were indispensable to its proper

exercise and not in conflict with our own statutory regulations on the same subject." *Griffin v. Griffin*, 47 N. Y. 137.

Even though the ecclesiastical law of England is not part of the law of this state, decisions under that law may be considered by our courts. *Hiscock J. in Hawkins v. Hawkins*, 193 N. Y. 409.

While the entire jurisdiction of the Supreme Court in an action to annul a marriage is conferred and regulated by statute, yet in the exercise of that jurisdiction, it proceeds as a court of equity unless controlled by some positive enactment. *Berry v. Berry*, 130 App. Div. 53; 114 N. Y. Supp. 497.

In *Perry v. Perry*, 2 Paige 501, it was held that that part of the common law of England, which rendered a marriage contract absolutely void in certain cases, formed a part of the law of this State, and may be enforced by the appropriate tribunals independent of any statutory provisions.

The Supreme Court has no inherent power to grant a divorce or separation, and can exercise such authority only as it is conferred by the legislature. But in actions to annul marriage it is otherwise, for in such actions the court has inherent jurisdiction. *Wood v. Wood*, 61 App. Div. 96; 70 N. Y. Supp. 72.

The courts of equity in this state annulled marriages for fraud even before the power of annulment was conferred by legislative enactment, as where a man in order to escape bastardy proceedings married a woman whose child was subsequently shown to be begotten by a negro. *Scott v. Shufeldt*, 5 Paige, 43.

CHAPTER IV.

ANNULMENT OF MARRIAGES.

VOID AND VOIDABLE MARRIAGES.

In this chapter an attempt is made to separate the substantive law respecting void and voidable marriages from the practice in actions for annulment. And here also will be found the provisions governing the right to maintain the action, as well as the effect of a decree of annulment upon the legitimacy of children. This task is difficult as the Code of Civil Procedure—nominally a manual of practice—contains nevertheless large portions of the substantive law on this as on other subjects.

The contract of marriage, like other contracts, may be void or voidable by reason of the incapacity of the parties to contract, or because of fraud or duress exercised by them.

The Church of Rome and those Sovereignities which accepted the rules of the Canon Law while maintaining the indissolubility of the marriage tie if the initial contract had validity, have always acknowledged that the contract under certain circumstances was void from the beginning, or voidable when so declared by the court. And in the latter case the decree related back to the beginning of the relation between the parties, so as to bastardize their issue. "If there be a divorce *a vinculo matrimonii* the issue between them will be bastards." Comyn Dig. Baron and Feme, C. 7.

And it should be remembered that when the older jurists

speaking of *divorce a vinculo* they mean not the severing of a valid bond of matrimony, but the annulment of a void or voidable marriage.

The jurisdiction of the courts of this state to annul marriages and to grant divorces is treated under the title "Jurisdiction." Ante, p. 40.

VOID MARRIAGES.

The marriages that are declared by our statute to be absolutely void are those that are incestuous or polygamous.

Domestic Relations Law. § 5. Incestuous and void marriages.

A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either:

1. *An ancestor and a descendant;*
2. *A brother and sister of either the whole or the half blood;*
3. *An uncle and niece or an aunt and nephew.*

If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.

Domestic Relations Law. § 6. Void marriages.

A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. *Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person;*
2. *Such former husband or wife has been finally sentenced to imprisonment for life;*

3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time.

When a marriage is absolutely void no decree of annulment is necessary to sever the relation of the parties. They are free to contract other marriages.

But the court will entertain an action for annulment in order that any doubtful questions of fact may be settled.

Where a marriage is absolutely void, an action to declare it void while proper is not necessary. *Stein v. Dunne*, 119 App. Div. 1; 103 N. Y. Supp. 894; *affd.* without opinion, 190 N. Y. 524.

In *Wightman v. Wightman*, 4 Johns. Ch. 345, the court while stating that the marriage of a lunatic was void from the beginning, adds: "The fitness and propriety of a judicial decision pronouncing the nullity of such a marriage is very apparent, and is equally conducive to good order and decorum and to the peace and conscience of the party."

MARRIAGES VOID BECAUSE OF CONSANGUINITY.

Incestuous marriages within some degrees of relationship are said to be void by the law of nature. But the validity of marriages between persons in more remote degrees depends upon the law of the jurisdiction.

By the Canon Law relationship by marriage, or affinity, was equivalent to consanguinity on the theory that husband and wife are one flesh.

Incestuous commerce whether under the guise of marriage or not, is criminal.

In *Wightman v. Wightman*, 4 Johns. Ch. 343, marriage between persons in the direct lineal line of consanguinity was stated to be clearly unlawful by the law of the land, independent of any church canon or of any statutory prohibition. Chancellor Kent says, in this case: "That such a marriage is criminal and void by the law of nature, is a point universally conceded. And, by the law of nature, I understand

those fit and just rules of conduct which the Creator has prescribed to man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared by divine revelation." It is also remarked in this case that marriages out of the lineal line, and in the collateral line beyond the degree of brothers and sisters, could not well be declared void as against the first principles of society.

The marriage of an uncle and niece was not incestuous at common law, and the statute making it so is not retroactive. If it were it would be unconstitutional as impairing the obligations of contract. A marriage of an uncle and niece made before such marriages were made incestuous by the statute will not be annulled if the wife was not under any disability at the time of the marriage and there was no fraud or concealment of the relationship and she voluntarily cohabited with her husband and has had children. *Weisberg v. Weisberg*, 112 App. Div. 231, 98 N. Y. Supp. 260.

In 1880 it was held that marriages between aunts and nephews were not void in this state. *Campbell v. Crampton*, 8 Abb. N. C. 363. Judge Wallace in this case remarked that: "The fact that marriages between persons so related are so commonly prohibited by legislation in those communities which are among the most advanced in moral and intellectual progress, must be deemed high evidence of the general prevailing public sentiment on the subject. Whether this sentiment finds its origin in the mandates of divine law, or the belief that such unions are a violation of the physical laws of nature, or in the conviction that to tolerate such alliances would impair the peace of families, and lead to domestic licentiousness, its existence must be acknowledged and traced to some or all of these sources."

Chapter 60 of the Laws of 1893 was the first legislative

enactment making marriages between uncles and nieces and aunts and nephews incestuous and void.

The chief English statute establishing the degrees of consanguinity and affinity within which marriage was prohibited was 32 Henry VIII. c. 38, which provided, "no prohibition, God's Law except, shall trouble or impeach any marriage without the Levitical degree." Thus, marriages between persons in the ascending and descending line were prohibited and those between collaterals to the third degree, as computed by the Civil Law. By this method the degrees were counted from one person back to the common ancestor and so on down to the other.

But marriage was not only prohibited between those related by blood, but also to the *affines*, or those related by marriage. And thus, a man may not marry his deceased wife's sister, nor his sister's daughter, nor his deceased wife's sister's daughter; but he may marry his first cousin, for she is in the fourth degree.

Although marriages within the prohibited degrees were punished by the Ecclesiastical Court *pro salute animarum*, such marriages were not considered void *ab initio*, but were voidable only by sentence of separation. They were esteemed valid to all civil purposes unless such separation was actually made during the life of the parties; and after the death of either party the Court of Common Law would not suffer the Spiritual Court to declare such marriages to have been void because such declaration could not tend to the reformation of the parties. 1 Bl. Com. 434.

Incestuous marriages were first declared to be absolutely void in England by the statute of 1835; 5 and 6 Wm. IV.

Incestuous marriages are criminal.

Penal Law. § 1110. Incest.

When persons, within the degrees of consanguinity, within which marriages are declared by law to be incestu-

ous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years.

It is no defense that the female with whom the defendant is charged with having committed the crime was his illegitimate daughter. *People v. Lake*, 110 N. Y. 61.

POLYGAMOUS MARRIAGES.

It is a fundamental rule that no man can have more than one wife, and no woman can have more than one husband at the same time. All marriages subsequent to the first are absolutely void so long as the first remains in force.

The former marriage may cease to be in force by:

- (1) Death.
- (2) Annulment, or absolute divorce.
- (3) The sentence of the former spouse to life imprisonment.

And if one of the parties has disappeared, the law allows a remarriage by the other after a certain time has elapsed if contracted in a bona fide belief that the missing spouse is dead. Otherwise one who could not prove the death of the absent spouse could never remarry. And so the law indulges the second marriage; but it is voidable if, in fact, the absent spouse is living. See post, p 72.

The New York statute on this subject has been given *ante*, p. 45. A marriage by a woman who has a husband living is void *ab initio* and not merely voidable if the former marriage had not been annulled or the husband sentenced to life imprisonment or he had not absented himself for five years without being known to the wife to be living. *Chittenden v. Chittenden*, 64 Misc. Rep. 649; 118 N. Y. Supp. 1005.

There is a distinction between marriages absolutely void and those merely voidable. If a marriage be absolutely void because the prior marriage of one of the parties was in force, and the case is not within the exceptions stated in section 6 of the Domestic Relation Law, the other party to

the second marriage can enter into another contract of marriage without a judicial decree annulling the marriage. *Stein v. Dunne*, 119 App. Div. 1; 103 N. Y. Supp. 894; *affd.* without opinion 190 N. Y. 524.

Where a woman marries a month previous to obtaining a divorce from her first husband, the second marriage will be annulled at the suit of the second husband having no knowledge of the first marriage and where there is no issue. *McCarron v. McCarron*, 26 Misc. Rep. 158; 56 N. Y. Supp. 745.

Where a common-law marriage is followed by cohabitation, there is a legal marriage, and where the wife marries again in the lifetime of the husband, the second husband is entitled to have his marriage annulled. *Herz v. Herz*, 34 Misc. Rep. 125; 69 N. Y. Supp. 478.

As to the annulment of a marriage on the ground that one of the parties has a spouse living, see *post* p. 72.

When a marriage is annulled both parties may remarry, if otherwise competent, as an annulment is granted on the theory that there was not a binding marriage.

But when the marriage tie is severed by an absolute divorce only the innocent party may remarry during the lifetime of the other unless:—

- (1) The second marriage take place in a jurisdiction where such remarriage is permitted.**
- (2) Permission be granted by the court.**

The right to remarry after divorce is treated, *post*, p. 102.

The right to remarry after the annulment of a former marriage results necessarily from the theory of annulment. "A decree of annulment does not render the marriage void, but in effect is a judicial determination that the alleged marriage in fact never existed, and renders the status of the parties the same as if they had always remained single." 19 Am. & Eng. Enc. 1220 citing *Perry v. Perry*, 2 Paige 501; *Price v. Price*, 124 N. Y. 589. And no decree is necessary if the first marriage be *absolutely* void.

One who marries a person having a former spouse living so that the marriage is absolutely void is competent to con-

tract to marry another person and is liable for a breach of a promise to do so. *Stein v. Dunne*, 119 App. Div. 1; 103 N. Y. Supp. 894; *affd.* without opinion, 190 N. Y. 524. As to divorce the case is different.

In *People v. Faber*, 92 N. Y. 146, it is held that a person against whom a divorce has been obtained because of adultery is regarded as having a husband or wife living, so long as the party obtaining the divorce lives. It may, therefore, be stated that a marriage with a person who has been divorced because of his adultery is void, unless the marriage was contracted in a state where such marriage is valid, in which case the *lex loci contractus* must prevail.

The case of *Van Voorhis v. Brintnall*, 86 N. Y. 18, states that the statute prohibiting the remarriage of a divorced person is penal in its nature, since it invalidates a marriage with any person who has been divorced because of his own adultery while the wife obtaining the divorce is living, and therefore places a restraint or punishment upon the person convicted of adultery. This case established the principle that a marriage with a divorced person convicted of adultery, contracted in a state where such a marriage is valid, must be considered valid here, and not within the provisions of the above section.

After a divorce has been granted on the grounds of the adultery of the husband he cannot, in this state, make a valid promise of marriage during the lifetime of his wife who obtained the divorce. *Haviland v. Halstead*, 34 N. Y. 643.

In an action to annul a marriage on the ground that a divorce procured by the defendant from a former wife was void, it appeared that the decree of divorce was granted in Massachusetts where the former marriage was not contracted, that the defendant did not reside in that state, nor was he served with process there, nor did he appear. It was held that the decree based upon constructive service by publication, was void in New York, and that the second marriage should be annulled. *Davis v. Davis*, 2 Misc. Rep. 549; 51 N. Y. St. Repr. 509; 22 N. Y. Supp. 191.

A person sentenced to life imprisonment is civilly dead, and hence his or her spouse may remarry without a decree of annulment or divorce.

Nor does a pardon restore marital rights.

The foregoing is evidently the theory upon which the statute (*ante* p. 45) is based. Civil death as resulting from such sentence is declared by the Penal Law:

Penal Law, § 511. Consequence of sentence to imprisonment for life.

A person sentenced to imprisonment for life is thereafter deemed civilly dead.

Upon the nature of civil death, see *Avery v. Everett*, 110 N. Y. 317, when it is stated: "The statute, without expressly declaring this result, assumes that a life sentence of the husband, *ipso facto*, dissolves his marriage."

Domestic Relations Law. § 58. Pardon not to restore marital rights.

A pardon granted to a person sentenced to imprisonment for life within this state does not restore that person to the rights of a previous marriage or to the guardianship of a child, the issue of such a marriage.

VOIDABLE MARRIAGES.

Aside from the marriages that are absolutely void there are those that are voidable—that is to say the marriage is valid until declared void by a decree of annulment; but in such case the decree relates back to the beginning of the relation, except as to the legitimacy of the children which is preserved by the statute in some cases.

The marriage will be annulled where either party:

- (1) Was under the age of legal consent;
- (2) Lacked mental capacity;
- (3) Lacked physical capacity;
- (4) Induced the marriage by force, duress or fraud; or,
- (5) Where the former spouse is living but the second marriage was contracted in good faith after the expiration of the time set by statute.

The legislation on this subject is found both in the Domestic Relations Law and in the Code of Civil Procedure where the substantive law is repeated in different terms.

Domestic Relations Law. § 7. Voidable marriages.

A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years;

2. Is incapable of consenting to a marriage for want of understanding;

3. Is incapable of entering into the married state from physical cause;

4. Consents to such marriage by reason of force, duress or fraud;

5. Has a husband or a wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time.

Actions to annul a void or voidable marriage may be brought only as provided in the code of civil procedure.

Code Civ. Proc. § 1742. Action by woman, married under 16, to annul marriage.

An action may be maintained, by the woman, to procure a judgment, declaring a marriage contract void, and annulling the marriage, under the following circumstances:

1. Where the plaintiff had not attained the age of sixteen years at the time of the marriage.

2. Where the marriage took place without the consent of her father, mother, guardian, or other person having the legal charge of her person.

3. Where it was not followed by consummation or cohabitation, and was not ratified by any mutual assent of the parties, after the plaintiff attained the age of sixteen years.

Code Civ. Proc. § 1743. In what other cases marriage may be annulled.

An action may also be maintained to procure a judgment, declaring a marriage contract void and annulling the marriage, for either of the following causes, existing at the time of the marriage:

1. That one or both of the parties had not attained the age of legal consent.



2. *That the former husband or wife of one of the parties was living, and that the marriage with the former husband or wife was then in force.*

3. *That one of the parties was an idiot or a lunatic.*

4. *That the consent of one of the parties was obtained by force, duress or fraud.*

5. *That one of the parties was physically incapable of entering into the marriage state. But an action can be maintained, under this subdivision, only where the incapacity continues, and is incurable.*

It will be seen that actions for annulment may be brought by persons other than the parties to the marriage, under certain restrictions. Moreover, the effect of the annulment on the legitimacy of children varies according to the ground of the annulment. These subjects will be treated in the following sections as part of substantive law. Matters of pure procedure in matrimonial action are treated, *post*, p. 134.

The court will annul a voidable marriage the more readily where it has not been consummated, as no question of public policy is involved.

A marriage not consummated is inchoate and incomplete so that questions of public policy are not involved. *Di Lorenzo v. Di Lorenzo*, 71 App. Div. 509; 75 N. Y. Supp. 878. Cited with approval in *Svenson v. Svenson*, 178 N. Y. 54.

A marriage not consummated will be annulled for fraud which would be otherwise insufficient. See *Svenson v. Svenson*, 178 N. Y. 54; *Nelson on Marriage and Divorce*, § 600; 1 *Bishop on Marriage and Divorce*, § 166.

ANNULMENT WHEN PARTY WAS UNDER AGE OF LEGAL CONSENT.

A person who marries under the age of eighteen years may bring an action to annul the marriage unless the contract has been ratified by cohabitation after that age was attained.

A person of the age of consent at the time of marriage cannot maintain the action although the other party was under age.

The action may be brought by the parent, guardian, or next friend of such infant, unless the contract has been ratified. The children of a marriage annulled for lack of age are the legitimate children of both parents.

Code Civ. Proc. § 1744. Action when party was under the age of consent.

An action to annul a marriage, on the ground that one of the parties had not attained the age of legal consent, may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person; as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age of legal consent when it was contracted, or where it appears that the parties, for any time after they attained that age, freely cohabited as husband and wife.

Code Civ. Proc. § 1749. Issue; when entitled to succeed, etc.

A child of a marriage, which is annulled on the ground that one or both of the parties had not attained the age of legal consent, is deemed, for all purposes, the legitimate child of both parents.

Age of consent.

At common law the age of legal consent is 14 years in males and 12 years in females. By the Revised Statutes, taking effect January 1, 1830, the age was raised to 14 years in the case of females and to 17 years in the case of males. But the section was repealed by section 24 of chapter 320 of the Laws of 1830 and was not re-enacted until by chapter 24 of the Laws of 1887, the age of legal consent in males was fixed at 18 years and that of females at 16 years. In the interval there was no statute governing the subject in this state and the common law rule prevailed.

For the history of the legislation in this state governing the annulment of marriages on the ground that the parties were under the age of legal consent, *See*, *Conte v. Conte*, 82 App. Div. 335; 81 N. Y. Supp. 923.

§ 1742. Code Civ. Proc., obsolete.

Section 1742 of the Code of Civil Procedure providing for the annulment of a marriage at the suit of a woman who marries under the age of 16 years, is obsolete. A woman who marries before the age of 18 years may maintain an action for annulment under section 1743. *Conte v. Conte*, 82 App. Div. 335; 81 N. Y. Supp. 923.

Foreign Marriage.

An action to annul a marriage upon the ground, that the parties were under the age of legal consent does not proceed upon the theory that the marriage was absolutely void, but on the theory that it is voidable. Where parties under the age of legal consent marry in a foreign country where the marriage is valid, our courts may nevertheless annul the marriage if the parties return to their residence here. *Mitchell v. Mitchell*, 63 Misc. Rep. 580; 117 N. Y. Supp. 671.

But it has been held that, our statutes allowing the annulment of marriages have no extraterritorial effect. Hence, where a resident of this state marries in a foreign jurisdiction where the marriage was legal, he cannot maintain an action in this state to annul the marriage upon the ground that he was under the age of legal consent. *Donohue v. Donohue*, 63 Misc. Rep. 111; 116 N. Y. Supp. 241.

Action by Parent; child must be made a party.

A parent cannot maintain an action to annul the marriage of his daughter upon the ground that she had not attained the age of legal consent without making her a party to the action. The marriage contract of one under the age of legal consent is not void, but merely voidable, at the election of one of the parties. A parent or guardian is not such party. *Wood v. Baker*, 43 Misc. Rep. 310; 88 N. Y. Supp. 854. As to infant as party in action for annulment brought by mother, see *Fero v. Fero*, 62 App. Div. 470; 70 N. Y. Supp. 742.

Consent of parents to marriage and consummation no bar to action.

An annulment under section 1743 may be maintained if

the parties have not freely cohabited as husband and wife after attaining the age of legal consent, even though the marriage was contracted with the consent of the parents of the minor, was consummated and the parties lived together before attaining the age of consent. *Conte v. Conte*, 82 App. Div. 335; 81 N. Y. Supp. 923. A woman who married under the age of 18 years may maintain an action for annulment under section 1743 of the Code of Civil Procedure although the parties have cohabited and the parents of the plaintiff consented to the marriage. The woman is not compelled to bring her action under section 1742. *Wander v. Wander*, 111 App. Div. 189; 97 N. Y. Supp. 586.

Section 1743 of the Code of Civil Procedure allowing an annulment where one of the parties was married under the age of legal consent is not limited to suits brought by a husband or the parent, guardian or next friend of either party. A woman who marries under that age may sue under the section. *Conte v. Conte*, 82 App. Div. 335; 81 N. Y. Supp. 923.

An action to annul a marriage is made out under section 1743 where the plaintiff was not of the age of legal consent and has not cohabited with her husband. *Silveira v. Silveira*, 34 Misc. Rep. 267; 69 N. Y. Supp. 634.

Fraud and adultery no defense.

It is no defense to a husband's action for annulment upon the ground that he was not of the age of legal consent to allege that he fraudulently represented that he was of legal age at the time of the marriage. *Quigg v. Quigg*, 43 Misc. Rep. 48; 85 N. Y. Supp. 550; citing *New York Building Loan Co. v. Fisher*, 23 App. Div. 363; 48 N. Y. Supp. 152.

Where an action is brought by a husband's mother to annul a marriage upon the ground that her son had not attained the age of legal consent, the wife cannot interpose a counterclaim alleging adultery of the husband and demanding a divorce, because the son is not a party to the action, and it constitutes no defense where the action is brought by the mother. Such counterclaim is demurrable. *Slocum v. Slocum*, 37 Misc. Rep. 143; 74 N. Y. Supp. 447.

Penal Law. § 70. Abduction.

A person who:

1. *Takes, receives, employs, harbors or uses, or causes or procures to be taken, received, employed or harbored or used, a female under the age of eighteen years, for the purpose of prostitution; or, not being her husband, for the purpose of sexual intercourse; or, without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage; * * * **

Is guilty of abduction and punishable by imprisonment for not more than ten years, or by a fine of not more than one thousand dollars, or by both.

LOSS OF MENTAL CAPACITY.

A Marriage contracted by a person of unsound mind is voidable, as are other contracts made by such a person.

The statute recognizes two forms of mental incapacity:

(1) Idiocy, or congenital mental defect which is necessarily permanent;

(2) Lunacy, or loss of original mental capacity caused by disease, which loss may be temporary or permanent.

In the former case the action for annulment can be brought only by a relation or friend of the idiot during the lifetime of either party, for an idiot can never gain sufficient mental capacity to sue.

In the latter case the action may be maintained not only by a relation or friend of the lunatic, but by the lunatic himself, if restored to sound mind. But no annulment can be granted if the lunatic restored to sound mind freely cohabits with the other party.

The child of such marriage is the legitimate child of the parent who was of sound mind.

Code Civ. Proc. § 1746. Id.; where party was an idiot.

An action to annul a marriage, on the ground that one of the parties thereto was an idiot, may be maintained, at any time during the lifetime of either party, by any relative of the idiot, who has an interest to avoid the marriage.

Code Civ. Proc. § 1747. Id.; where party was a lunatic.

An action to annul a marriage, on the ground that one

of the parties thereto was a lunatic, may be maintained, at any time during the continuance of the lunacy, or, after the death of the lunatic, in that condition, and during the life of the other party to the marriage, by any relative of the lunatic, who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic, at any time after restoration to a sound mind; but in that case, the marriage should not be annulled, if it appears that the parties freely cohabited as husband and wife, after the lunatic was restored to a sound mind.

Code Civ. Proc. § 1748. Action by next friend of idiot or lunatic.

Where no relative of the idiot or lunatic brings an action to annul the marriage, as prescribed in either of the last two sections, the court may allow an action for that purpose to be maintained, at any time during the lifetime of both the parties to the marriage, by any person as the next friend of the idiot or lunatic. But this section does not apply, where the marriage might have been annulled, at the suit of the lunatic, as prescribed in the last section.

Code Civ. Proc. § 1749. Issue, when entitled to succeed, etc.

*A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child of the parent who is of sound mind. * * **

The statute follows the common law. "It is too plain a proposition to be questioned," says the Chancellor in *Wightman v. Wightman*, 4 Johns. Ch. 343, "that idiots and lunatics are incapable of entering into the matrimonial contract"—unless in a lucid interval, which can happen only in the case of lunacy. But one who, in his lunacy, has assumed the marriage tie, may confirm the bond if he see fit when restored to sanity. And in this the rule conforms to that governing other contracts made by lunatics.

In *Banker v. Banker*, 63 N. Y. 409, it appeared in an action to annul a marriage upon the ground of the lunacy of the husband, that two days after the marriage an inquisition was found declaring the husband to be of unsound mind, and that he had been so for six months previous; the wife, at the time of the marriage, had notice that proceedings would be instituted to declare the husband a lunatic. It was held that the inquisition was conclusive against subsequent acts and dealings, and presumptive only against prior ones. It was, therefore, only presumptive evidence of the husband's incapacity at the time of the marriage.

A man in his last illness, being of unsound mind, contracted marriage *per verba de praesenti* with the woman who was attending him as nurse, and died without a consummation. The marriage was held to be void upon the ground that a lunatic is incapable of making such a marriage contract, and it is competent for any court, where the validity of it is incidentally involved, to treat it as a nullity. *Jaques v. Pub. Adm'r*, 1 Bradf. 499.

Parties.

An incompetent person is a necessary party to an action brought by her husband to annul her marriage on the grounds of her incompetency and because of fraud practised upon her. She is entitled to be brought in on her own motion. *Coddington v. Larner*, 75 App. Div. 532; 78 N. Y. Supp. 276.

LACK OF PHYSICAL CAPACITY.

As the ultimate purpose of marriage is the perpetuation of the race a physical incapacity to do so is a ground for annulment if the defect existed at the time of contract.

The action may be maintained by the injured party, or by the incompetent if unaware of the incapacity at the time of marriage, or if he thought it curable.

The statute of limitations is five years from the time of marriage.

Code Civ. Proc. § 1752. Action on the ground of physical incapacity.

An action to annul a marriage, on the ground that one of the parties was physically incapable of entering into the marriage state, may be maintained by the injured party

against the party whose incapacity is alleged; or such an action may be maintained by the party who was incapable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable. Such an action must be commenced before five years have expired since the marriage.

This ground for annulment was more favored in the past than to-day and especially so in the case of sovereigns where an heir to the crown was a matter of great political importance.

If the incapacity accrues after marriage there is no relief as the parties have taken each other "for better or for worse."

Comyns put it, "A divorce for impotence, or frigidity may be upon an universal impotence; as if he be an eunuch. Or, for a perpetual impotence *previous* to the marriage *quoad hanc*, be it natural or accidental." Baron and Feme, C. 3.

In modern law the action does not seem to be looked upon with favor. Thus a widow 56 years old who married a man 69 years of age cannot maintain an action to annul her marriage on the ground of her husband's physical incapacity, where it appears that the marriage was contracted for support and companionship. *Hatch v. Hatch*, 58 Misc. Rep. 54; 110 N. Y. Supp. 18.

In an action to annul a marriage on the grounds of sterility it was held that a woman who had her ovaries removed by an operation, and is incapable of conceiving, is not unable to enter into the marriage state so long as there is no impediment to physical commerce. Held, further, that where a woman before marriage had informed her intended husband that she had had an operation which made it doubtful as to whether she could bear children, that the marriage cannot be annulled upon the grounds of fraud, especially where the husband continued to cohabit with her after learn-

ing of her physical defects. *Wendel v. Wendel*, 30 App. Div. 447; 52 N. Y. Supp. 72.

The birth of twins seven months after marriage is a complete answer to the husband's charge of sterility. "This would seem to dispose of the question of defendant's want of capacity, unless plaintiff expected her to have triplets." *Riley v. Riley*, 73 Hun, 575; 57 N. Y. St. Repr. 270; 26 N. Y. Supp. 164.

To authorize a judgment nullifying a marriage because of the physical incapacity of the defendant, it must be shown that the incapacity existed at the time of the marriage and was incurable. Both these facts must be established by the most satisfactory evidence, and although they are admitted by the defendant, such a judgment will not be allowed until a surgical examination has been had for the purpose of ascertaining whether the alleged incapacity is incurable, if such defendant is within the jurisdiction of the court. The court has the necessary power and will compel the parties to submit to such a surgical or other examination as may be necessary to ascertain the facts for the correct decision of the cause; but, in a suit brought against a female, the court will not compel her to submit to further examination, if it appears that she has been already sufficiently examined by competent surgeons, whose testimony can be obtained by the complainant, to show that her physical incapacity is incurable. *Devenbagh v. Devenbagh*, 5 Paige, 554.

In this case Chancellor Walworth says: "Impotence on the part of a female which cannot be cured by proper medical treatment or a surgical operation is a case of very rare occurrence. Dr. Beck, in the last edition of his very learned and most valuable work on the subject of medical jurisprudence, after an elaborate examination of various cases of absolute and temporary incapacity for sexual intercourse, in both sexes, which have been noted or referred to by medical writers and others, arrives at the conclusion from a review of the causes of such incapacity, that the cases of absolute or incurable impotency are very few, and the number of such cases has been greatly reduced by the improvements in surgery.

"In every case of this kind, therefore, it is necessary that the court should proceed with the greatest vigilance and care, not only to prevent fraud and collusion by the parties, but also to guard against an honest mistake under which they may be

acting, merely from the want of proper medical advice and assistance. From the very nature of the case, it appears to be impossible to ascertain the fact of incurable impotence, especially where the husband is the complaining party, except by a proper surgical examination by skillful and competent surgeons, in connection with other testimony.

It was held in the case of *Kaiser v. Kaiser*, 16 Hun, 602, that the provision that the action must be begun within two years, as the section then read, was in effect a statute of limitation, and that the action is not barred by the lapse of that time, unless that objection is set up in the answer. As to a physical examination of the defendant, see *post*, p. 150.

FORCE, DURESS, AND FRAUD.

The contract of marriage, like other contracts, is voidable if procured by fraud.

But the fraud must go to the essence of the contract—which is the desire of the parties to become husband and wife.

Frauds as to financial standing or personal qualification do not go to the essence.

Frauds relating to freedom from venereal disease, and (in the case of women), previous chastity may go to the essence.

But the equities of each case seem to move the court to its decree, and it is impossible to formulate a rule.

The action on the ground of fraud, force or duress may be maintained by the innocent party, or by a relation of such party during the lifetime of the other party.

Voluntary cohabitation after the duress, or after the knowledge of the fraud bars the action.

Code Civ. Proc. § 1750. Action on the ground of force, fraud, etc.

An action to annul a marriage, on the ground that the consent of one of the parties thereto was obtained by force, duress, or fraud, may be maintained, at any time, by the party whose consent was so obtained. Such an action may also be maintained, during the lifetime of the other party,

by the parent or the guardian of the person of the party, whose consent was so obtained, or by any relative of that party, who has an interest to avoid the marriage. But a marriage shall not be annulled on the ground of force or duress, if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud.

Misrepresentations as to previous chastity.

Where a woman induces a man to marry her by falsely representing that he is the father of her child, and he would not have consented but for the representation, the fraud goes to the essence of the contract and justifies an annulment if after knowledge of the fraud there was no voluntary cohabitation. *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467.

A marriage will be annulled for fraud where the woman on inquiry of her intended husband stated that she had been the wife of a man then deceased, who was the father of her child, when in truth she had been his mistress and the child was a bastard, if the plaintiff did not cohabit with the defendant after the discovery of the fraud, although the marriage was consummated.

It is true that such representation does not go to the *essentialia* of the marriage contract, as previous chastity is not a necessary qualification, but prior chastity if insisted upon may be made an essential qualification.

Such misrepresentation may be grounds for an annulment of the marriage for fraud because as a matter of law it may be material upon the question of consent, which is essential to the contract of marriage. *Domschke v. Domschke*, 138 App. Div.—; 122 N. Y. Supp. 892.

In this case authorities on misrepresentation as to previous

chastity as fraud warranting an annulment collated and discussed, *per Jenks, J.*

A husband suing to annul a marriage for fraud upon the ground that his wife gave birth to a child one month after marriage will not be granted a decree where it appears that he married her with full knowledge of her advanced state of pregnancy, and there is no proof of any deception on her part. *Bange v. Bange*, 46 Misc. Rep. 196; 94 N. Y. Supp. 8.

The earlier cases were against annulment on this ground; but it seems equitable that the husband, if he insist upon it as a condition of the marriage, should be entitled to a chaste spouse. The woman's right does not seem to be so clear.

The fact that a husband concealed from his wife the fact that prior to their marriage he had unlawfully cohabited with another woman, and had had children by her, is not such fraud as will warrant an annulment of the marriage. The fraud contemplated by subdivision 4 of section 1743 of the Code is fraud relating to the essentials of the contract. *Glean v. Glean*, 70 App. Div. 576; 75 N. Y. Supp. 622.

If a party knowing that he cannot be a father of a bastard child, is induced to marry the mother to avoid prosecution, it is no ground for annulling the marriage contract on the ground of fraud, although he afterwards be able to establish the fact that the child was not his. *Scott v. Schufeldt*, 5 Paige, 43.

A man's ignorance of a woman's pregnancy at the time of marriage, without positive concealment by her, is not a ground for annulling a marriage. *Barth v. Barth*, 5 Monthly Law Bulletin, 87.

A marriage will not be annulled on the ground that the plaintiff was induced to contract it by reason of the false representations that the defendant was pregnant by him. *Tait v. Tait*, 3 Misc. Rep. 218; 52 N. Y. St. Repr. 645; 23 N. Y. Supp. 597.

The fact concealed from the husband that the wife, before marriage, had given birth to an illegitimate child, does not, in itself, constitute such fraud as will authorize an annulment of the marriage. *Shrady v. Logan*, 17 Misc. Rep. 329; 40 N. Y. Supp. 1010.

Concealment of venereal disease.

Such misrepresentation, naturally, goes to the essence of

the matrimonial contract. Equity will annul a marriage for fraud where one of the parties concealed the fact that he was inflicted with a contagious, hereditary venereal disease even though he had recovered at the time of the action, especially where the marriage was never consummated so that the status of the parties does not involve a question of public policy. *Svenson v. Svenson*, 178 N. Y. 54.

In *Anonymous*, 21 Misc. Rep. 765; 49 N. Y. Supp. 331, it appears in an action brought by a mother to annul for fraud, the marriage of her minor daughter, that, during the engagement, and before the marriage ceremony, the defendant had stated to the daughter that he was in good health, that, in reliance upon the statement, she entered into the marriage relation, that he then was afflicted with a local, chronic and contagious venereal disease, which she contracted from him, and from which she suffered severely and was still suffering at the time of the trial. This was held to be sufficient to justify an annulment of the marriage upon the ground that the husband was guilty of fraud in stating to the person who subsequently became his wife that he was physically sound and capable of exercising the marital functions when, in fact, the exercise of these functions was certain to afflict her with a loathsome disease.

Other frauds.

The fraud which will lead the court to annul a marriage must be such as shocks the sense of fairness and is successful by its very audacity and baseness. *Scott v. Shufelt*, 5 Paige, 43; *Ferlat v. Gojon*, 1 Hopk. 478; *Sloan v. Kane*, 10 How. Pr. 66; *Clarke v. Clarke*, 11 Abb. Pr. 228; *Klein v. Wolfsohn*, 1 Abb. N. C. 134.

In *Fisk v. Fisk*, 6 App. Div. 432; 39 N. Y. Supp. 537, Judge Rumsey, in writing the opinion of the court, says: "While the jurisdiction to annul a marriage is based upon the ordinary equity jurisdiction of the court, the fraud which will induce the court to set aside the marriage is sometimes different from the fraud which will induce the court to set aside an ordinary contract which has been executed, or even a contract which is still executory. The con-

tract of marriage is something more than a mere civil agreement between the parties, the existence of which affects only the parties themselves. It is the basis of the family. Its dissolution, as well as formation, is a matter of public policy in which the body of the community is deeply interested, and, it is to be governed by other considerations than those which obtain with regard to an ordinary civil contract *inter partes*. Although recently the courts have been strict in laying down and maintaining rules as to the annulment of this contract, and in requiring a higher degree of proof before permitting it to be set aside for fraud, than is requisite for the annulment of ordinary contracts, and insisting also that the fraud which shall invalidate the contract must be something more than mere misrepresentation as to collateral matters. The rule is well settled that no fraud will void a marriage which does not go to the very essence of the contract, and which is not in its nature such a thing as would either prevent the party from entering into the marriage relation or, having entered into it, would preclude the performance of the duties which law and custom impose upon the husband or wife as a part of that contract. (Citing 1 Bishop on Marriage and Divorce, §§ 183, 184; Schouler on Husband & Wife, § 27; Reynolds v. Reynolds, 3 Allen, 605.) Within that rule it has been held that fraudulent representations of one party as to birth, social position, fortune, good health and temperament do not vitiate the contract; and so also, it seems to be a well established rule that no misconception of one party as to the character, or fortune, or temper of the other, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. If, when the relation is entered into, the party is competent to make that contract, is mentally competent to do the duties which the contract involves and physically able to meet its obligations, nothing more can be required; and, however the other party

may be disappointed as to physical or mental characteristics which he or she expects would exist, such disappointment is no ground for setting aside a contract which the public good requires should be rendered indissoluble, except for the gravest reasons. It is well settled that the mere fact that the woman, previous to her marriage, has, without the knowledge of her husband, been guilty of incontinence, affords no ground for setting aside the marriage contract, if she has reformed. If that be true, much more may it be said that where the only objection is that the party complained of has once been married, but is now free to enter into a new relation, it can afford no possible barrier to her entering into such relation; and if her previous condition was not disclosed, that is no such fraud as would warrant the court in setting aside the marriage contract."

The court, in this case, disapproves of the case of *King v. Brewer*, 8 Misc. Rep. 587; 60 N. Y. St. Repr. 692; 29 N. Y. Supp. 1114, where a marriage was annulled because the defendant was engaged in a disreputable occupation of which the plaintiff was ignorant at the time of the marriage. The case of *Clarke v. Clarke*, 11 Abb. Pr. 228, was approved.

The husband's fraud in inducing the marriage by false representations as to his character and property is not a ground for an annulment of the marriage. *Klein v. Wolfsohn*, 1 Abb. N. C. 134.

Where the defendant, by fraudulently representing himself as an honest, industrious man, induced the plaintiff, a young woman, to marry him, when he was in fact a notorious thief, and was afterwards committed to prison, the marriage should be annulled for fraud. *Keyes v. Keyes*, 6 Misc. Rep. 355; 26 N. Y. Supp. 910.

In the case of *Clarke v. Clarke*, 11 Abb. Pr. 228, the facts appeared that the husband, before marriage to his present wife, had represented to her that his former wife was dead, whereas, in truth, she was living, he having been divorced from her. It was held that these representations, even if fraudulent, and though the plaintiff would not have married him, if she had known the truth, were not sufficient for granting her a decree nullifying the marriage. It was not a fraud in the

material matter or thing, even as to the ordinary or legitimate purpose of marriage, and supposed intent of the parties in contracting the marriage.

In the case of *Moot v. Moot*, 37 Hun, 288, it appeared that a girl just beyond the statutory age of consent, while absent from home on a visit to relatives, was induced by the defendant, who was twenty-four years old, and had been employed for about four months upon the farm of the plaintiff's father, to enter the house of a clergyman, and have a marriage ceremony performed. The plaintiff at first refused to be married without the consent of her parents and because of her youth; the defendant falsely stated to her that her parents knew the object of his visit, and that they would not care or object, and assured her that she need not live with him for three or four years, and that the ceremony should be kept secret, and that she should continue to reside with her parents and attend school. The marriage was never consummated. It was held that as these representations related to the very essence of the contract, and were false, and made with intent to induce the plaintiff to consent, they furnished sufficient ground to unhold a judgment declaring the marriage contract void, as having been obtained by fraud.

Where a shrewd, designing, lewd and unchaste woman in middle age, knowing that an old man, who is deaf, and living in seclusion, is a firm believer in spiritualism, takes advantage of such belief, seeks his acquaintance pretending to be a medium and receiving communications from spirits commanding that they marry, and that the old man convey to her valuable property, claims to be a clairvoyant physician, and to be able to cure his deafness, and by other frauds and devices induces the old man to marry her and to convey to her the property, the marriage and conveyance will be set aside, as procured by fraud and undue influence, when the court is satisfied from all the evidence that they were so procured. *Hides v. Hides*, 65 How. Pr. 17.

Waiver of fraud by cohabitation.

A marriage will not be annulled for fraud where after the commencement of the action the parties voluntarily cohabited as husband and wife with knowledge of the fraud. *Steimer v. Steimer*, 37 Misc. Rep. 26; 74 N. Y. Supp. 714.

A husband cannot allege, as a ground for annulling a marriage, that his wife made false representations to him whereby he was induced to marry her, when he otherwise would not have done so, when, during cohabitation he discovered the falsity of such representations, yet continued to

cohabit with her for two years after such discovery. *Muller v. Muller*, 21 Weekly Dig. 287.

Duress.

A marriage may be annulled on the ground of duress, where the duress was exercised by the defendant's relatives and friends, and not by the defendant personally. *Anderson v. Anderson*, 74 Hun, 56; 26 N. Y. Supp. 492; affirmed 147 N. Y. 719.

Bishop on Marriage & Divorce, § 212, says: "Force, to constitute in law duress, must be unlawful. A contract, for example, to free the maker from lawful arrest or to avoid such threatened arrest is not, therefore, invalid, and a man lawfully arrested on a process for bastardy or seduction cannot, if he marries the woman to procure his discharge, have the marriage declared void as procured by duress. Nor is it otherwise though he have a good defense and enters into the marriage simply to avoid being imprisoned under the process, and he afterwards discovers that he might have made his defense successful. But, if the process of arrest is void, or otherwise the imprisonment is unlawful, and he marries the woman to regain his liberty, the marriage will, on his prayer, be set aside. Perhaps the same result will follow if the arrest, while not technically illegal, is both malicious and without probable cause. Citing *State v. Davis*, 79 N. C. 603; *Johns v. Johns*, 44 Tex. 40; *Sickles v. Carson*, 26 N. J. Eq. 440; *Dies v. Winne*, 7 Wend. 47; *Williams v. State*, 44 Ala. 27.

Parties; action by parents.

In an action by the mother of an infant to annul the infant's marriage, under section 1750 of the Code, upon the ground that the infant's consent was obtained by fraud, duress, etc., the infant is a necessary party to the action. *Fero v. Ferro*, 62 App. Div. 470; 70 N. Y. Supp. 742.

Where a decree of annulment was fraudulently obtained by collusion between an infant wife and her husband, it was held that the wife's mother as *amicus curiae* could attack the decree of annulment for fraud. *Steimer v. Steimer*, 37 Misc. Rep. 26; 74 N. Y. Supp. 714.

Children of marriage induced by fraud or duress.

Code Civ. Proc. § 1751. Custody, maintenance, etc., of issue of such a marriage.

The court must, upon the application of the plaintiff, award the custody of the children of a marriage, which is annulled on the ground of force, duress, or fraud, to the innocent parent, unless it appears that the latter is unfit, for any reason, to have the custody of one or more of the children, in which case the court must give such directions relating thereto, as the interests of the child or children require. The judgment may make provision for the education and maintenance of the children, out of the property of the guilty parent.

There is no statute making the children of a marriage annulled for fraud or duress the legitimate children of either parent. Hence it is to be presumed that the common law applies, and the children will be bastards.

Civil action for damages where marriage is procured by fraud.

If a person procures a marriage by false representations between himself and a woman, when by law he is not competent to enter into a marriage contract, he is liable to her in damage. If the marriage is void under the statute, an action may be maintained against the fraudulent husband without first procuring a formal annulment of the contract. *Blossom v. Barrett*, 37 N. Y. 434.

Criminal liability when marriage is procured by fraud.

Penal Law. § 928. Falsely personating another.

A person who falsely personates another, and, in such assumed character:

*1. Marries or pretends to marry, or to sustain the marriage relation towards another, with or without the connivance of the latter; * * * **

Is punishable by imprisonment in a state prison for not more than ten years.

Penal Law. § 532. Compelling woman to marry.

A person who by force, menace or duress, compels a woman against her will to marry him, or to marry any other person, or to be defiled, is punishable by imprisonment for a term not exceeding ten years, or by a fine of not more than one thousand dollars, or by both.

ANNULMENT BECAUSE FORMER SPOUSE IS LIVING.

Where a former spouse has been absent for five years, and the other party after due diligence can learn nothing of the missing spouse, the law allows a remarriage.

If the former spouse be in fact living the second marriage is voidable.

The action for annulment may be maintained:

(1) By the former spouse;

(2) By either party to the second marriage during the lifetime of the other, except when plaintiff does not come into court with clean hands.

When the second marriage was contracted in good faith, the children thereof are the legitimate children of the party who was competent to contract.

Code Civ. Proc. § 1745. Action when former husband or wife was living.

An action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties during the lifetime of the other, or by the former husband or wife. Where it appears,

and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead, or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes the legitimate children of the parent who at the time of the marriage was competent to contract, and are entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said parent; and the issue so entitled must be specified in the judgment, and the innocent party must be awarded their custody, and he or she is entitled to appoint a guardian of their persons by will.

This section shall be construed to extend to all cases where the judgment or decree of nullity of such subsequent marriage is rendered after the passage of this act whether such subsequent marriage was contracted before or after the passage hereof.

The second marriage is indulged by the law, otherwise one who could not prove the death of a former spouse would be held to celibacy for life. But if the former spouse returns he may assert his marital rights by an action for annulment.

Where a person remarries after a former spouse has absented himself or herself for five successive years then last past, without being known to such person to be living during that time, the second marriage is not void but merely voidable on the discovery that the former spouse is living. *Stokes v. Stokes*, 128 App. Div. 838; 113 N. Y. Supp. 142.

In speaking of the former statute. Justice Clerke of the General Term of the Supreme Court, in the case of *Griffin v. Banks*, 24 How. Pr. 213, says: "The language of the statute is very general and positive, without any reservation or exception, express or implied; and yet it would apparently be at variance with the plainest principles of justice, that the first husband should be deprived of his marital rights, merely by her mistake, arising from an absence which, under many

circumstances, he could not avoid, and, which, indeed, may have originated in an endeavor to promote the common benefit of both. If the second marriage is to be upheld the first ceases to have any validity; both certainly cannot co-exist. Under our law, and under that of all Christendom, for many centuries, if not from the very origin of Christianity, no man shall have more than one wife, and no woman more than one husband, at the same time. Does the law, then, provide no redress for the husband who has been thus injured by the act of his wife, committed under a mistake? I think it does. It places the first marriage only in abeyance. It only temporarily suspends the rights of the first husband unless, by his own neglect or acquiescence, he should waive or abandon them."

If the first husband omits or neglects to resort to the proper remedy to annul the second marriage, the latter marriage continues in force after the death of the first husband, and has the same force and effect as if, when it was solemnized, the first husband was not alive. *Griffin v. Banks*, 24 How. Pr. 213. See also *Valleau v. Valleau*, 6 Paige, 207.

Good faith required, or second marriage is absolutely void.

A person desiring to re-marry upon the ground that the husband or wife has absented himself or herself from the State for five successive years without being known to such person to be alive during that time, must act in good faith, and use all such means to obtain such information with respect to the absent spouse as reasonable persons would make use of under such circumstances. She cannot shut her eyes and ears without making such inquiry, and then marry at the end of the five years. *Circus v. Independent Order of Awahas*, 55 App. Div. 534; 67 N. Y. Supp. 342.

The absence of the husband for a period of five successive years is not in itself a sufficient justification for the wife's re-marriage. The statute is based upon the probability that in such case the absentee is dead, and is designed to protect the person who, in good faith, acts upon the statute. The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith

would have acted under the circumstances. *Gall v. Gall*, 114 N. Y. 109.

The court in this case remarks: "The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void. A statute with such possibilities should be so construed as to promote good order, and the person availing himself of its privilege should be required to act in perfect good faith. (Citing *Jones v. Zoller*, 32 Hun, 280, 282; *Cropsey v. McKinney*, 30 Barb. 47; *McCartee v. Camel*, 1 Barb. Ch. 455, 464.) He decides the question as to his right to re-marry for himself, without application to any court or public authority. The whole responsibility rests upon him. He cannot shut his eyes and ears and justify a second marriage because for five years he did not hear of his wife. Did he try to hear of her? Did he honestly believe she was dead? Did he make inquiry? Were the circumstances such that a reasonable man, honestly desiring to learn the truth, would have made inquiry? Was he excused from inquiring by a false report of her death? Questions of this character are involved in the ultimate question of good faith, which is necessarily for the jury, as it depends upon the inferences to be drawn from a great many circumstances."

A wife is not justified in re-marrying after six years from the time her husband has been imprisoned for assault, without making a subsequent inquiry as to his whereabouts. *Alixanian v. Alixanian*, 28 Misc. Rep. 638; 59 N. Y. Supp. 1068.

Assuming that a wife whose adultery causes her husband to leave her, can, after the expiration of five years, bring herself within the provisions of the statute protecting subsequent marriages, where the wife has been deserted by her husband, something more than the mere act of desertion by the husband must be shown; it must be shown where the husband went to reside, or that diligent inquiry in that respect had proved unavailing; that he had abandoned his former resorts or occupations, and, if his residence was discovered, that he had

afterwards abandoned such residence without leaving any trace of where he had gone. *Matter of Tyler*, 80 Hun, 406; 62 N. Y. St. Repr. 57; 30 N. Y. Supp. 330.

A wife abandoned her husband on account of his intemperate habits, cruel treatment, and absence from home, and during five successive years resided in an adjoining county with a second husband, and it did not appear that she had knowledge of the death of her first husband, or that he was not generally well known to be living. It was held not to be such a continuous absence of five successive years as to render valid the second marriage and authorize the issuing of letters to the woman as the widow of the second husband. *Wyles v. Gibbs*, 1 Redf. 382.

The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith would have acted under the circumstances. *Gall v. Gall*, 114 N. Y. 109.

The provision for the avoidance of a second marriage contracted by a person whose former spouse has been absent five years, applies only where the absentee has been discovered to be still alive. *Nesbit v. Nesbit*, 3 Dem. 329.

The marriage may be valid if the husband or wife "has absented himself or herself for five successive years then last past without being known to such person to be living during that time." Two leading facts must be found to bring a case within the terms of this statute: First, "That the husband or wife has absented himself or herself;" and secondly, "That he or she has not been known to such person to be living during the space of five successive years." *Jones v. Zoller*, 29 Hun, 551. In this case it was stated that the words "absented himself" evidently refer to a withdrawal of his whereabouts from his wife, his relations, and from the ordinary and usual opportunities of identification. That withdrawal from his wife and family which would, after the lapse of five successive years, lead naturally to the inference that death had ensued.

Action by parties to second marriage.

A second marriage, where a wife marries after five years' absence of her former husband, believing him to be dead, can be adjudged void only at the instance of one of the parties to it during the life of the other. *Cropsey v. McKinney*, 30 Barb. 47; *Griffin v. Banks*, 24 How. Pr. 213, reversed on other grounds, 37 N. Y. 621; *Anon.* 15 Abb. N. S. 171.

A party to the second marriage will not be granted an annulment, although the former spouse be living, when, with knowledge of the fact, the marriage has been ratified.

A second marriage contracted in good faith will not be annulled upon the ground that the defendant's former husband is living, when the second husband after discovering the fact continued to live with his wife for two years and promised to defend the second marriage so long as she faithfully discharged her marital duties. *Stokes v. Stokes*, 128 App. Div. 838; 113 N. Y. Supp. 142.

Section 1745 of the Code of Civil Procedure which allows an action to annul a marriage upon the ground that a former spouse of one of the parties was living and that the former marriage is in force, is designed to protect the innocent and relieve those who have acted in good faith. Hence, where a husband remarried within five years from the disappearance of his former wife, with no reason to believe that she was dead and continued to cohabit with his second wife after discovering that his first wife was living, the court will not entertain an action for annulment brought by him. *Berry v. Berry*, 130 App. Div. 53; 114 N. Y. Supp. 497.

A woman is entitled to a decree of separation and for alimony on the ground of abandonment and non-support although at the time of her marriage she had a former husband living, if she believed him to be dead after having made diligent inquiry as to his whereabouts for five years prior to her second marriage and after the discovery that the former husband was living she and her second husband continued to live together, and hold themselves out to the world as man and wife. *Taylor v. Taylor*, 173 N. Y. 266.

Section 7 of the Domestic Relations Law declaring that the second marriage is void only from the time its nullity is declared by a court of competent jurisdiction is not mandatory and the court will not annul the second marriage although the former spouse be living

if the decree would be highly inequitable and the plaintiff does not come into court with clean hands. *Stokes v. Stokes*, 128 App. Div. 838; 113 N. Y. Supp. 142.

Where a woman innocently and without knowing that a man has a wife living, goes through a ceremonial marriage and the parties continue to live together as husband and wife after the death of the former wife, their marriage is valid as a common law marriage. *Matter of Schmidt*, 42 Misc. Rep. 463; 87 N. Y. Supp. 428.

Second marriage by divorced person.

A marriage cannot be annulled on the complaint of a party thereto, on the ground that the parties being domiciled in this state, and knowing that one of them was prohibited from marrying again by a judgment of a court of this state granting a divorce to a former spouse, contracted their marriage in another state, to which they went temporarily for the purpose of evading the prohibition while the former spouse was living. Even if such a marriage is void the plaintiff is equally in the wrong with the defendant and the court will not grant relief. *Kerrison v. Kerrison*, 8 Abb. N. C. 444.

In the case of *In re Borrowdale*, 28 Hun, 336, it was held that where a husband has procured a judgment divorcing him from his wife and forbidding her to marry again, a marriage contracted by her, even where her former husband has been absent for five years without being known to her to be living during that time, is void, and its invalidity may be asserted by the heirs-at-law and next-of-kin of the second husband after his death. See *Gall v. Gall*, 114 N. Y. 109.

Limitation of action.

The statute of limitations does not apply to an action to annul a marriage upon the ground that the defendant has a former spouse living. *Chittenden v. Chittenden*, 64 Misc. Rep. 649; 118 N. Y. Supp. 1005.

CHAPTER V.

DIVORCE.

The only ground for absolute divorce in the State of New York is adultery.

Moreover, the court cannot entertain the action unless:—

- (1) Both parties were residents when the offense was committed; or
- (2) The parties were married here, or
- (3) The plaintiff was a resident when the offense was committed, and is a resident when the action is brought, or
- (4) The offense was committed here and the plaintiff is a resident when the action is brought.

Code Civ. Proc. § 1756. In what cases action may be maintained.

In either of the following cases, a husband or a wife may maintain an action, against the other party to the marriage to procure a judgment, divorcing the parties and dissolving the marriage, by reason of the defendant's adultery.

- 1. Where both parties were residents of the State, when the offense was committed.*
- 2. Where the parties were married within this State.*
- 3. Where the plaintiff was a resident of the State, when the offense was committed, and is a resident thereof, when the action is commenced.*
- 4. Where the offense was committed within the State, and the injured party, when the action is commenced, is a resident of the State.*

The fact that the action is wholly statutory has been shown in Chapter III, *ante*, p. 33. And no action lies unless the

case can be brought within one of the subdivisions of the statute.

The State of New York is conservative in the matter of divorce, and the fact that many of our sister states will sever the marital tie for causes which may seem to be more trivial has led suitors to seek the foreign jurisdiction—and there results a conflict of law with which the courts have dealt as best they may, and which illustrates the evils of state rights where the matter is one of national concern. This conflict of law is treated under the rubric, “Foreign Divorces.” *post*, p. 239.

The action for divorce, like an action in tort, abates with the death of a party before final judgment.

An action for divorce abates on the death of the plaintiff, and hence, where the plaintiff dies after interlocutory judgment, final judgment cannot be entered. *Matter of Crandall*, 196 N. Y. 127. An action for divorce does not survive the death of a party and this is true although the death does not occur until after the entry of an interlocutory decree. *Bryon v. Bryon*, 134 App. Div. 320; 119 N. Y. Supp. 41.

A married woman may, for the purposes of divorce (or separation), acquire a different domicile from that of her husband, though by the common law her domicile follows his.

The domicile must be bona fide; but being a matter of intention—a mental state on the part of the plaintiff—the courts can measure that intention only by appearances.

The New York Statute (unlike the statutes of most states), does not name a period of residence, which must be shown, in order to give the court jurisdiction. But as divorces are granted for a single cause there is little danger that jurisdiction will be sought for ulterior purposes.

Code Civ. Proc. § 1768. Married women deemed a resident in certain cases.

If a married woman dwells within the state, when she

commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere.

The word "resident," as used in this section, is synonymous with inhabitancy or domicile as distinguished from temporary residence. It means permanent abode. *De Meli v. De Meli*, 120 N. Y. 485. The theoretical presumption that the residence of the wife follows that of the husband, is not sufficient to meet the jurisdictional requirements as to the residence of the parties, specified in this section. There must be an actual residency on the part of the wife. *Hewes v. Hewes*, 40 N. Y. St. Repr. 680; 16 N. Y. Supp. 119; *Gray v. Gray*, 143 N. Y. 354, 359.

A married woman may acquire a domicile in a jurisdiction other than that of her husband when necessary to enable her to maintain an action for a limited divorce on the ground of cruel treatment. *Atherton v. Atherton*, 82 Hun, 179; 64 N. Y. St. Repr. 798; 31 N. Y. Supp. 977; *aff'd* 155 N. Y. 131. The provisions of this section seem to recognize the exception to the rule that the domicile of the wife is that of the husband.

The case of *Hunt v. Hunt*, 72 N. Y. 242, states the exception in the following words: "When the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce she may have a domicile in another jurisdiction than that of her husband. She may acquire a separate domicile whenever it is necessary for her to do so. The right to do so springs from the necessity for its exercise."

In *Gray v. Gray*, 143 N. Y. 354, the court says: "It is no doubt true that *prima facie* the domicile of the husband is that of the wife, but it is equally true that in a case where a separation takes place by reason of the domestic difficulties, the wife may obtain a residence in this state which will

enable her to maintain" an action for a divorce. See also *People v. Baker*, 76 N. Y. 78; *Mellen v. Mellen*, 10 Abb. N. C. 329; *Rundle v. Van Inwegan*, 9 Civ. Proc. Rep. 326.

Where a husband abandons his wife and children in this state without making provision for their support, and removes to another state, the residence of the wife does not follow that of the husband. *Halter v. Van Camp*, 64 Misc. Rep. 366; 118 N. Y. Supp. 545; where a wife was visiting her relatives in a foreign state at the time her husband committed adultery, her legal residence, nevertheless, will be presumed to be that of her husband. *Harris v. Harris*, 83 App. Div. 123; 82 N. Y. Supp. 568. For facts establishing the residence of a wife in this state so as to entitle her to maintain an action for divorce, see *Doeme v. Doeme*, 96 App. Div. 284; 89 N. Y. Supp. 215.

Facts giving jurisdiction.

To maintain an action in the courts of this state it must appear that, where the marriage was solemnized without the state, both parties were inhabitants of the state at the time of the adultery. *Mix v. Mix*, 1 Johns. Ch. 204.

If the marriage was solemnized without the state, it must appear that both parties were residents of the state when the offense was committed, or that the plaintiff was a resident of the state when the offense was committed and the action was commenced, or if the offense was committed within the state, that the plaintiff was a resident at the time of commencing the action. The residence must be actual and *bona fide*. *Williamson v. Parisien*, 1 Johns. Ch. 389.

Where the plaintiff is a resident of this state, was a resident when the offense charged was committed, and when the action was commenced, and the marriage was solemnized here, the courts of this state have jurisdiction of an action for a divorce, though the defendant be a non-resident, and service was made upon him by publication. *Scragg v. Scragg*; 44 N. Y. St. Repr. 845; 18 N. Y. Supp. 487.

PROOF OF ADULTERY.

As the state has an interest in preserving the marriage relation, and as the results of divorce are serious, the fact of adultery must be clearly proven—not beyond a reasonable doubt, but with a greater degree of certainty than the facts supporting the ordinary civil action.

Where the evidence in a divorce action is as consistent with innocence as with guilt, the divorce will not be granted. *Poillon v. Poillon*, 78 App. Div. 127; 79 N. Y. Supp. 545. A divorce cannot be granted upon circumstantial evidence if the facts are as consistent with innocence as with guilt, but the evidence need not be such as to establish the guilt of the defendant beyond a doubt. *Roth v. Roth*, 90 App. Div. 87; 85 N. Y. Supp. 640; *affd.* 183 N. Y. 520.

Evidence of adultery should be closely scrutinized, and unless clearly convincing and pointed, the presumption of innocence should prevail. *Donnelly v. Donnelly*, 63 How. Pr. 481.

Although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only by fair inference but as a necessary conclusion; appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. Evidence simply showing full and frequent opportunity for illicit, carnal intercourse, is not alone sufficient to found an inference that the criminal act was committed. *Pollock v. Pollock*, 71 N. Y. 137.

Parties seeking a divorce must prove a full and complete case. Nothing is to be taken in favor of the applicant by intendment or presumption, even in case of a default in answering or at the hearing. *Linden v. Linden*, 36 Barb. 61. See also *Steffens v. Steffens*, 33 N. Y. St. Repr. 643; 19 Civ. Proc. Rep. 267.

The mere fact that a defendant wife in an action for divorce left her home on the same day as her alleged paramour left his does not prove they went together or substantiate the adultery. *Isaacs v. Isaacs*, 29 Misc. 557; 61 N. Y. Supp. 956.

As adultery is usually concealed, it may be proved by circumstantial evidence.

While the consequences that follow a judgment of divorce

are so serious that such a judgment should not be granted unless the evidence which furnishes the basis therefor is, after very careful scrutiny, satisfactory and such as can command the confidence of a careful, prudent and cautious judge, the courts must take such evidence as the nature of the case permits, circumstantial, direct or positive; and bringing to bear upon it the experiences and observations of life, and thus weighing it with prudence and care, give effect to its just preponderance. *Moller v. Moller*, 115 N. Y. 466. See also *Mott v. Mott*, 3 App. Div. 532; 73 N. Y. St. Repr. 742; 38 N. Y. Supp. 261; and *Warren v. Warren*, 8 Misc. Rep. 189; 59 N. Y. St. Repr. 390; 29 N. Y. Supp. 313.

The fact of adultery may be established by proof of such facts and circumstances as, under the rules of evidence, are competent to be proved, and which satisfy the mind of the tribunal, required to pass upon the question, of the truth of the charge. It is not necessary to satisfy the mind beyond a doubt, or to lead the judgment as a necessary conclusion to the determination that adultery has been actually committed. *Allen v. Allen*, 101 N. Y. 658.

In an action for a divorce, the fact of adultery need not be proved by direct evidence, but generally may be made out from circumstances, which involve the fact by fair inference and lead to it as a necessary conclusion. *Mulock v. Mulock*, 1 Edw. Ch. 14.

If resort is had to circumstantial evidence, such evidence must lead inevitably to that fact, exclusive of every other conclusion. Evidence of full and sufficient opportunity for illicit intercourse is not, of itself, sufficient. *Pollock v. Pollock*, 71 N. Y. 137. See also *Conger v. Conger*, 82 N. Y. 603.

On proof that a wife was found at midnight with a man not her husband, under circumstances which irresistibly required an inference of adultery, the court will find her guilty of that offense in preference

to accepting her version, which though supported by the testimony of her paramour is not pleaded in her answer. *Lutz v. Lutz*, 28 Misc. Rep. 393; 59 N. Y. Supp. 972.

In an action for absolute divorce brought by the husband evidence of indiscreet language by the wife when under the influence of liquor and in the presence of friends of the plaintiff invited by him to be present is inadmissible, upon the ground that such evidence had no bearing upon, nor does it tend to support the allegations of adultery. *Franey v. Franey*, 28 App. Div. 50; 50 N. Y. Supp. 918.

A divorce will not be granted upon the mere impressions of the plaintiff's witnesses as to defendant's relations with the co-respondent. As for example, that the defendant had looked at the co-respondent in a manner that indicated that improper relations existed between them. *Pettus v. Pettus*, 37 Misc. Rep. 315; 75 N. Y. Supp. 462.

Identification of the defendant by means of a photograph is criticised in *Bigelow v. Bigelow*, 34 Misc. Rep. 265; 69 N. Y. Supp. 643; where it was held that the testimony of a witness to the adultery was not sufficient for a decree in an uncontested divorce, where it merely states that he was acquainted with her and identifies her from the photograph, which is identified by the husband. The witness should further state the circumstances under which he made the defendant's acquaintance and what knowledge he had of her identity. The identification of the photograph by the plaintiff alone is of no value unless corroborated.

The court will not find adultery merely because there was an opportunity; a lascivious mind and inclination of both parties towards the act must be shown.

Proof of opportunity to commit adultery does not warrant a divorce; there must always be proof of an inclination towards wrongdoing. *Hutchinson v. Hutchinson*, 53 Misc. Rep. 438; 104 N. Y. Supp. 1074. Evidence of full and sufficient opportunity for illicit intercourse is not, of itself, sufficient. *Pollock v. Pollock*, 71 N. Y. 137. Evidence of association, frequent interviews and intimacy between the defendant and the woman with whom he is charged with having adulterous intercourse, will not sustain the charge, in absence of credible evidence of improper conduct or familiarities, or of any criminal attachment between them, especially when the evidence shows that the meetings might have been for proper purposes. *Conger v. Conger*, 82 N. Y. 603.

Every act of adultery implies three things: First, the opportunity; second, the disposition of the mind of the adulterer; and, third, the same in the mind of the *particeps criminis*. And the proposition is substantially true that, whenever these three are found to concur, the criminal act is committed. Bishop on Mar. & Div. (4th ed.), § 619.

In an action for divorce evidence that the defendant committed adultery with the correspondent prior to the offense alleged is admissible to show the lascivious disposition of the defendant. Roth v. Roth, 90 App. Div. 87; 85 N. Y. Supp. 640; aff'd 183 N. Y. 520.

If an opportunity be shown and with it a disposition to commit adultery, the commission of the adultery may be inferred. Jayne v. Jayne, 25 N. Y. Supp. 810. In this case it appeared that the wife fastened the door leading from her bedroom to that of her husband and left unlocked the door leading to the room of her alleged paramour. This was deemed a sufficient opportunity. The court held that other like offenses might be shown to corroborate the specific act complained of, not as independent testimony, but as tending to characterize the improper intercourse between the parties alleged in the bill. Citing 2 Greenleaf Evi., § 47; Bishop on Mar. & Div. (4th ed.) § 625.

This holding is different from that found in Germond v. Germond, 6 Johns. Ch. 347, where it is held that acts of adultery not charged cannot be proved for any purpose. In the case of Stevens v. Stevens, 54 Hun, 490, evidence of indiscretions with other men than those with whom the adultery was charged in the complaint was held to be inadmissible to show the lustful disposition on the part of the defendant. Citing Beadleston v. Beadleston, 2 N. Y. Supp. 809; McDermott v. State, 13 Ohio St. 334; Washburn v. Washburn, 5 N. H. 195.

Opportunity.

A divorce may be granted on evidence that the defendant registered himself and a woman not his wife, at a hotel under an assumed name as husband and wife and were assigned to a room. Kerr v. Kerr, 134 App. Div. 141; 118 N. Y. Supp. 801. For, says Gaynor, J., citing Burton's Anatomy, "It is presumed he saith not a *pater noster*"; Jenks, J., dissenting. But in Taylor v. Taylor, 123 App. Div. 220; 108 N. Y. Supp. 428; it was held that the re-marriage of a woman in a foreign state after a divorce obtained there was

of itself no proof of sexual intercourse, even though she bore a child seven months after her return to this state, non access of the first husband not being shown.

As to evidence justifying a divorce in that the husband registered at an hotel in company with another woman, see *Harris v. Harris*, 83 App. Div. 123; 82 N. Y. Supp. 568.

Because a husband who has separated from his wife, has an unmarried woman in his house, ostensibly as a housekeeper, it is not sufficient to establish his adulterous relation with her, where both testify that such a relation did not exist. *Welke v. Welke*, 17 N. Y. Supp. 298.

To show that a man visited a brothel is not, standing alone, good proof of his adultery; but if a woman go there the presumption is against her.

Proof of two or three visits to a brothel, by a husband, unaccompanied by a women, is not sufficient evidence of adultery to authorize a divorce. *Van Epps v. Van Epps*, 6 Barb. 320. See also *Zorkowski v. Zorkowski*, 27 How. Pr. 37.

So, also, where the defendant was seen at a house of ill-fame by two servants thereof, and that he had once been seen in the room of an inmate, it was held to be insufficient to establish adultery, since there was no evidence that he was ever shut up in a room alone with such inmate. *Platt v. Platt*, 5 Daly, 295; *Fraser v. Fraser*, 3 Month. Law Bull. 61.

A wife going to a house of ill-repute with another man is evidence of adultery, since it is not to be conceived that a woman would go to such place but for a criminal purpose. *Shelf. on Mar. & Div.* 409.

But, if the evidence of frequenting houses known to be of ill-repute is unexplained, it is sufficient to justify an inference of guilt. *Van Name v. Van Name*, 49 Hun, 264; 17 N. Y. St. Repr. 651; 2 N. Y. Supp. 77; citing *Allen v. Allen*, 101 N. Y. 658. See, also in this connection, *Mott v. Mott*, 3 App. Div. 532; 73 N. Y. St. Repr. 742, 38 N. Y. Supp. 261;

Carpenter v. Carpenter, 9 N. Y. Supp. 583; Smith v. Smith, 13 N. Y. Supp. 817.

Evidence that the defendant was seen in a saloon, and that he went with the girl who tended bar into a hall, is insufficient to establish adultery, when there is no evidence that the saloon was a house of ill-fame. Hunn v. Hunn, 1 T. & C. 499.

Venereal disease acquired after marriage may be evidence of adultery.

The fact of a husband having a venereal disease long after marriage is *prima facie* evidence of adultery. Johnson v. Johnson, 14 Wend. 637.

In a suit by a wife, there was no evidence of adultery by the husband, but by implication from certain stains on his linen, supposed to result from venereal disease, it was held that this was insufficient to authorize a verdict of guilt. Ferguson v. Ferguson, 1 Barb. 604. In this case a record verdict against the defendant on the same evidence was again set aside. Ferguson v. Ferguson, 3 Sandf. 307. In this last case it was considered as unsafe to regard as sufficient evidence that the husband had the disease eighteen months after the marriage, because it could not be safely inferred that it was not existing before the marriage and had broken out afresh. See also, in this connection, Homberger v. Homberger, 46 How. Pr. 346; Auld v. Auld, 16 N. Y. Supp. 803; Clark v. Clark, 7 Robt. 276; Klein v. Klein, 42 How. Pr. 166, 11 Abb. Pr. N. S. 450.

As the law guards against collusion, a divorce will not be granted on the confession of the defendant, unless there be corroboration, or its genuineness be shown by surrounding circumstances.

A divorce will not be granted on the defendant's confession unless it is shown to be of such a character as precludes all

suspicion of collusion, and in general such confession must be corroborated by other proof. *Diederich v. Diederich*, 44 Misc. Rep. 591; 90 N. Y. Supp. 131. The adultery of a defendant cannot be established by admissions in her answer. *Taylor v. Taylor*, 123 App. Div. 220; 108 N. Y. Supp. 428. A wife is entitled to a decree of divorce where her husband admits at trial that he committed adultery in the company of a detective whom the plaintiff employed to watch him and there is evidence that the offence was committed without her consent, procurement or connivance. *Tuck v. Tuck*, 117 App. Div. 421; 102 N. Y. Supp. 688.

The confessions of the defendant as to his adultery are admissible in evidence, but to avoid the danger of collusion, the court, before granting the decree, will require such corroboration of the confession as to remove all just suspicion of collusion. When that is satisfactorily done, the confessions become a sufficient basis for a judgment for divorce. *Madge v. Madge*, 42 Hun, 524; 4 N. Y. St. Repr. 609; citing *Matchin v. Matchin*, 6 Pa. St. 332; *Billings v. Billings*, 11 Pick. 461.

Where the confessions are perfectly free from taint of collusion, confirmed by circumstances and the conduct of the accused, the evidence is sufficient. *Sigel v. Sigel*, 20 N. Y. Supp. 377; 47 N. Y. St. Repr. 397.

Confessions are not alone sufficient to establish a charge of adultery. A sentence of divorce will not be given upon the sole confession of the parties. This is a general rule. But the foundation of the rule is the fear of collusion and imposition on the court. When, however, the reason of the rule fails, the rule itself ceases. Hence, whenever the confession is made under circumstances which entirely preclude suspicion of collusion or imposition, the confession will be received, and a decree granted thereon, without other evidence. *Lyon v. Lyon*, 62 Barb. 138.

See *Phillips v. Phillips*, 24 Misc. Rep. 334; 52 N. Y. Supp. 489, for a case where a divorce was refused on the alleged confession of defendant, where the only witness for plaintiff was her brother.

Divorce will not be granted on the uncorroborated testimony of paramours, prostitutes, or detectives.

If a paramour admits the criminality, the evidence is to be received with caution and should be corroborated. This rule does not apply where the paramour denies his guilt. *Pollock v. Pollock*, 71 N. Y. 137.

In the case of *Crary v. Crary*, 46 N. Y. St. Repr. 307; 18 N. Y. Supp. 753, an absolute divorce was granted in a litigated action upon the uncorroborated testimony of the co-respondent when there was no fraud or collusion.

Proof of adultery by paramours should be received with great reluctance, and must be corroborated. *Delling v. Delling*, 34 Misc. Rep. 122; 69 N. Y. Supp. 479.

The requirement of corroboration of a paramour's testimony was founded on the inability of a party charged with adultery to contradict the testimony in an action between the parties for a divorce on that ground, before the amendment of section 831 of the Code, permitting a husband or wife to be a witness to disprove adultery in such an action. Since that amendment the force of the reason requiring such corroboration has been weakened, and the sufficiency of such testimony must now depend mainly on the degree of the paramour's credibility. *Steffens v. Steffens*, 33 N. Y. St. Repr. 643, 19 Civ. Proc. Rep. 267.

In the case of *Beadleston v. Beadleston*, 2 N. Y. Supp. 809, the evidence of an alleged paramour was not accorded much credibility, since it appeared that he threatened exposure of the wife if she did not pay him money.

As to value and weight of testimony of co-respondents in refuting charges of adultery, see *Uhland v. Uhland*, 59 N. Y. St. Repr. 655; 27 N. Y. Supp. 647.

The unsupported evidence of defendant's paramour is subject to the same objection as the evidence of any other accomplice. *Anon.*, 5 Robt. 611.

Prostitutes and detectives.

The testimony of a prostitute, uncorroborated, is not suffi-

cient to prove adultery. *Turney v. Turney*, 4 Edw. Ch. 566; *Banta v. Banta*, 3 Edw. Ch. 295. Proof of illicit intercourse with a notorious prostitute before marriage and a continuance of the intimacy afterwards, together with evidence of defendant's dissolute character and habits, is sufficient evidence of adultery. *Van Epps v. Van Epps*, 6 Barb. 320.

The rule as to corroboration of evidence by detectives and prostitutes is merely for the guidance of the judicial conscience, and is not a rule of evidence. Therefore if such evidence support the conclusions of the trial judge, and the judgment is affirmed by the Appellate Division, the controversy should be deemed closed in the Court of Appeals. *Winston v. Winston*, 165 N. Y. 553.

The uncorroborated testimony of a prostitute paid for testifying, and of the detective who employed her, is not enough. *Bentley v. Bentley*, 3 Month. Law Bull. 76.

Uncorroborated evidence of servants who have lived in houses of ill-repute is not sufficient. *Platt v. Platt*, 5 Daly, 295.

In *Moller v. Moller*, 115 N. Y. 466, Judge Earl said: "The courts have come to regard the uncorroborated evidence of prostitutes as insufficient to break the bonds of matrimony."

If the defendant fails to take the stand in his own behalf, slight corroboration of the charges of adultery made by dissolute women is sufficient. *McCarthy v. McCarthy*, 143 N. Y. 235.

Where the testimony of prostitutes is corroborated by proof of facts and circumstances harmonizing therewith, giving such weight and strength to the testimony as to induce belief in its truth, a judgment founded thereon is proper. *Moller v. Moller*, 115 N. Y. 466.

The testimony of prostitutes and private detectives in matrimonial causes requires corroboration, but where it is the only evidence obtainable, it must be taken for what it is worth, and where it is adduced on both sides, the preponderance must be weighed. *Mott v. Mott*, 3 App. Div. 532; 73 N. Y. St. Repr. 742; 38 N. Y. Supp. 261.

WHEN DIVORCE WILL NOT BE GRANTED; DEFENSES.

Even though the adultery of the defendant be proved, the plaintiff will not be granted a divorce:—

- (1) If the plaintiff procured or connived at the adultery.
- (2) If the plaintiff, knowing of the offense, forgave it. But forgiveness is conditioned upon reformation.
- (3) If the action be not commenced within five years from the time the adultery was discovered.
- (4) If the plaintiff also be guilty of adultery, for they are well watched.

Code Civ. Proc. § 1758. When divorce denied, although adultery proved.

In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. *Where the offense was committed by the procurement or with the connivance of the plaintiff.*
2. *Where the offense charged has been forgiven by the plaintiff. The forgiveness may be proved, either affirmatively, or by the voluntary cohabitation of the parties, with the knowledge of the fact.*
3. *Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery, by the plaintiff of the offense charged.*
4. *Where the plaintiff has also been guilty of adultery, under such circumstances, that the defendant would have been entitled, if innocent, to a divorce.*

Connivance and collusion.

A divorce will be denied where it appears that the offense charged was committed by the procurement or with the connivance of the plaintiff. Bishop on Mar. & Div. says: "Connivance is a defense available in all divorce cases, though it will be found to arise most frequently in suits for adultery. It is defined to be a corrupt consent on the part of the married party to the conduct of the other of which he afterward complains." Connivance destroys all claims to remedy by way of divorce, being founded on the obvious principle that no man has a right to relief from a court for an injury which he was chiefly instrumental in affecting. *Myers v. Myers*, 41 Barb. 114.

Collusion in matrimonial actions is an agreement between husband and wife to procure a judgment dissolving the marriage. The fact that the wife at the time of a judgment of absolute divorce in her favor settled property on her husband for his future support does not establish collusion. *Doeme v. Doeme*, 96 App. Div. 284; 89 N. Y. Supp. 215.

Conduct which amounts to connivance must be actuated by corrupt intention, for where there is no corrupt intention proved on the part of the complainant the remedy is not barred. *Hoar v. Hoar*, 3 Hagg. Ecl. 137.

Collusion which will defeat an action for divorce is collusion in procuring or conniving at the adultery. A mere arrangement facilitating the proceeding in the action is not collusion. *Dodge v. Dodge*, 98 App. Div. 85; 90 N. Y. Supp. 438.

For facts tending to shown collusion which justified the refusal of a divorce. See *Galloway v. Galloway*, 92 App. Div. 300; 86 N. Y. Supp. 1078.

Armstrong v. Armstrong, 45 Misc. Rep. 260; 92 N. Y. Supp. 165.

Failure to prevent adultery as collusion.

While the law very justly condemns any act on the part of the husband by which he voluntarily leads his wife into temptation or in any way connives at or procures her defilement, it does not prevent him from scrutinizing her conduct or detecting her in her voluntary violation of the sanctity of the married relation. *Pettee v. Pettee*, 77 Hun, 595; 28 N. Y. Supp. 1067; *affd.* 148 N. Y. 735.

Where a husband believes that his wife has already committed adultery and intends to persist in adulterous intercourse, he is not guilty of connivance in not actively interfering to prevent the commission of the offence, where he does so with the intention of obtaining evidence, if under the circumstances he desired to prevent the adultery and could not do it. *Reiersen v. Reiersen*, 32 App. Div. 62; 52 N. Y. Supp. 509.

A decree of absolute divorce in favor of a husband was vacated on

the ground of fraud and imposition upon the court and because of connivance, where the husband hired detectives to procure evidence, one of whom became acquainted with the wife, induced her to travel with him on the night boat, arranged so that they would be caught by a confederate, and where the detective on the trial as a witness was given a false name, and he succeeded in persuading the wife to withdraw her answer so that judgment was taken on default. *Helmes v. Helmes*, 24 Misc. Rep. 125; 52 N. Y. Supp. 734.

In the case of *Karger v. Karger*, 19 Misc. Rep. 236; 44 N. Y. Supp. 219, the plaintiff knew that his wife was about to commit the offense of adultery and arranged by means of an agent for the discovery of the adultery and permitted it to be committed. The court held that from the testimony the inference was irresistible that the plaintiff was willing that the defendant should commit the act in order that he might obtain a divorce. After citing the leading text-book writers and several cases, he comes to the conclusion that connivance may be a passive permitting of adultery as well as an actual procuring of its commission. This would seem to differ from the rule laid down in the case of *Pettee v. Pettee*, *supra*. In the latter case it appears that while the husband's suspicions had been aroused, he did not take any affirmative steps to bring about the meeting between the defendant and her paramour, but merely left her to her own volition. He did nothing to prevent the adultery. The court holds that these acts do not amount to a procurement of, or connivance at his wife's wrongdoing.

In the case of *Bunnell v. Greathead*, 49 Barb. 106, it was said: "That it would be a dangerous principle to establish that a husband who is suspicious of his wife's infidelity shall be allowed to lay a train which might lead her to the commission of adultery in order that he may take advantage of it to obtain a divorce."

Bishop on Mar. & Div., § 21, states that: "If the husband receives a caution concerning the conduct of his wife, or if he sees what a reasonable man could not see without alarm, he is called upon to exercise a peculiar vigilance and care over her; and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the consequences."

In *Schouler's Husband & Wife*, § 540, it is stated that connivance will be presumed from passive as well as active encouragement of the offense. In this connection, see *Huntley v. Huntley*, 26 N. Y. Supp. 266.

Divorce was refused to the wife although her husband made default where it appeared that he committed the acts for the avowed purpose of furnishing grounds for divorce and by collusion with her son, who communicated the facts to her. *Cowan v. Cowan*, 23 Misc. Rep. 754; 53 N. Y. Supp. 93.

Condonation.

If the offense of adultery be forgiven by the plaintiff, no divorce will be granted. The voluntary cohabitation of the parties after a knowledge of the commission of the offense is proof of forgiveness. Condonation is conditional forgiveness of an injury and the repetition of the offense revives a condoned adultery. *Smith v. Smith*, 4 Paige, 432.

To revive a condoned adultery so as to entitle the injured party to a divorce, the subsequent misconduct of the defendant must appear to have been of the same character. *Johnson v. Johnson*, 4 Paige, 460.

Cohabitation, to bar the husband's remedy, should be with knowledge not only of the offence committed, but also of his ability to prove it. *Quincy v. Quincy*, 10 N. H. 272; *Hoffmire v. Hoffmire*, 7 Paige, 60.

Cohabitation by a wife with a guilty husband is not in all cases a strict bar against her, as she is, to a certain extent, under the control of her husband. The cohabitation must, in all cases, be voluntary with full knowledge of the act of adultery. Condonation to be effectual must be an act in which both husband and wife assent and participate. *Betz v. Betz*, 2 Robertson, 694, 19 Abb. Pr. 90.

To establish condonation as a defense to an action for divorce for the adultery of the wife, it is not only necessary that the husband should have full knowledge of the facts, but that he should be able to prove them. Hence a proof of confession to the wife by the husband would not suffice, as there would be no mode of proving the confession under the law as it stands. *Uhlman v. Uhlman*, 17 Abb. N. C. 236.

Condonation based on the husband's promise to treat his wife properly which he fails to do, is no bar to the action. *Timerson v. Timerson*, 2 How. Pr. N. S. 526.

Where a wife while suspecting her husband of adultery has no proof thereof, the fact that she continues to occupy the same room with him is not sufficient to establish condonation as a matter of law. *Harris v. Harris*, 83 App. Div. 123; 82 N. Y. Supp. 568.

Adultery of plaintiff.

The principle of recrimination obtained in matrimonial actions before the action for absolute divorce was created by statute.

Divorces are only granted for the criminal acts of one of the parties to the marriage and in favor of the one who is innocent. If both parties are guilty, neither has any claim to relief. *Wood v. Wood*, 2 Paige, 108.

If a husband, who seeks to obtain a divorce on the ground of the criminal conduct of his wife, has himself been guilty of the same offense, either before or after the adultery of his wife, it is a conclusive bar to the suit. *Smith v. Smith*, 4 Paige, 432; *Anonymous*, 17 Abb. Pr. 48.

In jurisdictions where offences less than adultery are ground for divorce they may be set up in recrimination. 9 Am. & Eng. Enc. 818.

But not so in New York. It is no defence to a husband's action for divorce that he abandoned his wife. Such abandonment confers no license to offend against the marital vows. *Mattison v. Mattison*, 60 Misc. Rep. 573; 113 N. Y. Supp. 1024.

Evidence sufficient to establish the defense of recrimination must be as strong as that required to establish the plaintiff's cause of action. *De Marco v. De Marco*, 116 App. Div. 304; 101 N. Y. Supp. 600. But see *Peck v. Peck*, 44 Hun. 290; 7 N. Y. St. Repr. 653.

EFFECT OF DIVORCE.

Logically, an absolute divorce severs the relation of husband and wife and the parties should (in theory) be restored to their original status, both as to property rights and as to the right to remarry.

But (in fact) the law of New York imposes penalties on the guilty party.

The fact that a decree of absolute divorce completely

severs the marital relation as to both parties, appears from the opinion of the court, in *Atherton v. Atherton*, 181 U. S. 162, as follows: "The marriage tie when thus severed as to one party ceases to bind the other. A husband without a wife or a wife without a husband is unknown to the law. When the law provides in the nature of a penalty that the guilty party shall not marry again, that party as well as the other is still absolutely freed from the bond of the former marriage."

Where the decree is granted to the wife the statute provides as follows:—

- (1) The legitimacy of children born or begotten before the commencement of the action is not affected;
- (2) The defendant may be required to support his former wife and his children.
- (3) The defendant's interest in his former wife's property, if any, is cut off.
- (4) The plaintiff's right of dower is preserved.

Code Civ. Proc. § 1759. Regulations when action brought by wife.

Where the action is brought by the wife, the following regulations apply to the proceedings:

1. *The legitimacy of any child of the marriage, born or begotten before the commencement of the action, is not affected by the judgment dissolving the marriage.*

2. *The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such application shall be made*

by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

3. *If, when final judgment is rendered, dissolving the marriage, the plaintiff is the owner of any real property; or has, in her possession or under her control, any personal property, or thing in action, which was left with her by the defendant, or acquired by her own industry, or given to her by bequest or otherwise; or if she is or may thereafter become entitled to any property, by the decease of a relative intestate; the defendant shall not have any interest therein, absolute or contingent, before or after her death.*

4. *Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower, in any real property, of which the defendant then is or was theretofore seized, is not affected by the judgment.*

See also; Final Judgment, post. p. 174.

Effect of judgment upon rights of the wife.

During the marriage the husband owes to the wife the duty of support and maintenance, although owing her no debt in a legal sense of the word. The divorce, with its incidental allowance of alimony, simply continues his duty beyond the decree and compels him to perform it, but does not change its nature. The divorce and its consequent separation are the result of his own actions, and do not relieve him from the continued performance of the marital obligation of support. The form and measure of the debt are changed, but its substance remains unchanged. The allowance becomes a debt only in the sense that the general duty over which the husband had discretion and control has been changed into a specific duty over which not he, but the court, presides.

Under the second subdivision of this section the court

may require the husband to provide for the support of his wife, but may not require him to furnish a fund for the payment of her debts. The court will not lend its aid to compel the appropriation of alimony to a wife in the decree of divorce to the payment of a debt contracted by her and actually subsisting prior to the date of the decree. *Romaine v. Chauncey*, 129 N. Y. 566.

A testamentary trust for the benefit of a daughter, income payable during her husband's life, is not terminated although the wife obtains an absolute divorce and the husband remarries. *Pelton v. Macy*, 124 App. Div. 367; 108 N. Y. Supp. 713.

The surplus income resulting from a trust fund, created for the benefit of a judgment debtor, which can be reached by her creditors, is that which is beyond what is necessary for the suitable support of the debtor and those dependent upon her, in the manner in which they have been accustomed to live. In an action for divorce the amount of alimony is fixed, having special reference to the manner in which they have been accustomed to live, and such a sum is determined upon as is suitable for the support of the wife, having regard to the circumstances of the respective parties; and if, in a creditor's suit, the question as to what is a suitable sum for the maintenance of the wife can be considered at all, there must be kept in special view, in the consideration thereof, the manner in which the wife had been accustomed to live. *Andrews v. Whitney*, 82 Hun, 117; 63 N. Y. St. Repr. 486; 31 N. Y. Supp. 164.

Effect on dower.

Under the rule of the common law the wife's right of dower was not barred by a judgment dissolving the marriage contract for the husband's adultery. *Wait v. Wait*, 4 N. Y. 95; *Forrest v. Forrest*, 6 Duer, 102; *Day v. West*, 2 Edw. Ch. 592.

A wife who has obtained a divorce in her favor is entitled, notwithstanding her remarriage, upon her former husband's death, to dower in his real property and to one-third of his personal property. *Van Voorhis v. Brintnall*, 23 Hun, 260, *reversed*, on other grounds, in 86 N. Y. 18. The wife is not entitled to dower in lands of her husband of which

he became seized after the divorce. *Kade v. Lauber*, 16 Abb. Pr. N. S. 288.

As to the effect of divorce on dower rights, see *post*, p. 344,

As to modification or annulment of decree for alimony, see that caption, *post*, p. 219.

Where the decree is granted to the husband the statute provides as follows:—

- (1) The legitimacy of children of the marriage is not affected; unless it be made an issue.
- (2) The plaintiff's rights in his former wife's property are preserved. But these are mere expectancies which she may defeat.
- (3) The defendant's rights in her former husband's property (including dower) are extinguished.

Code Civ. Proc. § 1760. Regulations when action brought by husband.

Where the action is brought by the husband, the following regulations apply to the proceedings:

1. *The legitimacy of a child, born or begotten before the commencement of the offense charged, is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined, as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children, begotten before the commencement of the action, must be presumed.*

2. *A judgment dissolving the marriage does not impair, or otherwise affect, the plaintiff's rights and interests, in and to any real or personal property, which the defendant owns or possesses, when the judgment is rendered.*

3. *Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property, or to a distributive share in his personal property.*

The wife loses her right of dower only where, upon proof and a finding or a verdict of adultery, the court has, in an action brought against her, given judgment of divorce against

the wife and dissolved the marriage contract. The forfeiture is not a consequence of the offense, but of the judgment founded thereon. So, where, in an action for divorce brought by a husband against his wife, the referee found the wife guilty of the adultery charged, and also found the husband guilty of the same offense, and thereupon a judgment was entered dismissing the complaint, it was held that the wife had not lost her right of dower. *Schiffer v. Pruden*, 64 N. Y. 47.

In the case of *Pitts v. Pitts*, 52 N. Y. 593, the wife was proven guilty of adultery, but no judgment of divorce was rendered because there had been a condonation by the husband. It was held that the wife did not lose her right of dower.

Where a wife absents herself from her husband for five successive years, without being known by him to be living within that time, and he contracts a second marriage, which is annulled in an action between them because the first wife is living, the second wife is not entitled to dower in real estate owned by him at the date of the entry of judgment of nullification. *Price v. Price*, 124 N. Y. 589, 37 N. Y. St. Repr. 146.

A decree dissolving a marriage for a cause not regarded as adequate by the laws of the state, rendered in another state, by a court having jurisdiction of the subject and the parties in an action by the husband will not deprive the wife of her then existing rights in the lands in this state. Section 48 of R. S. Pt. II, ch. 8, tit. 1, from which subdivision 3 was derived, declared that "A wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower." This section was repealed by ch. 245, Laws of 1880, but the provisions contained in the present law are not different. *Van Cleef v. Burns*, 118 N. Y. 549.

Use of husband's name.

The court has power in a decree of absolute divorce to forbid the use by the wife of the husband's name, and having done so, her continuing to use it may be punishable as a contempt. *Blanc v. Blanc*, 21 Misc. Rep. 268; 47 N. Y. Supp. 694.

REMARRIAGE AFTER DIVORCE.

The law of New York (differing from that of many jurisdictions), places restrictions on the right of the guilty party to remarry. This is in the nature of a penalty.

The statute allows the innocent party to remarry. But the guilty party cannot do so, unless after five years have elapsed since the divorce, the court grants him leave on a showing of uniform good conduct.

But as the validity of marriage is governed by the law of the place of contract, the guilty party may remarry in a jurisdiction when such remarriage is permitted, and it will be held good here.

The statute permits the parties to resume the tie.

Domestic Relations Law. § 8. Marriage after divorce for adultery.

Whenever a marriage has been or shall be dissolved, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall only be made upon satisfactory proof that five years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good. But this section does not prevent the remarriage of the parties to the action.

As to the fact that divorce, in theory, absolutely severs the bond of marriage and leaves both parties free to marry, save as a penalty is imposed, see *ante*, p. 96.

Where a divorced husband moves for permission to remarry under the statute, for uniform good conduct for five years, no notice need be given to the plaintiff wife, as she has no interest in the penalty for her husband's adultery, which is imposed solely in the interest of the public. *Matter of Salmon*, 34 Misc. Rep. 251; 69 N. Y. Supp. 215.

Remarriage before final decree.

An interlocutory judgment of divorce does not dissolve the marriage relation and a remarriage of one of the parties prior to final judgment is void. Nor is the second marriage made valid because the parties continued to live together after final judgment, if at the time the statute abolishing common law marriages had taken effect. *Pettit v. Pettit*, 105 App. Div. 312; 93 N. Y. Supp. 1001.

The plaintiff in an action for divorce upon being informed by the referee in the action that he had reported in her favor, and granted a divorce, remarried believing herself legally divorced, but the decree was not entered in fact until after such marriage. Upon a motion by the defendant to set aside the decree on the ground of the plaintiff's adultery, it was held that under the circumstances, it was not sufficient ground for refusing a decree if it had been known to the court when applied for, and was not sufficient ground for vacating such decree. *Robertson v. Robertson*, 9 Daly, 44.

A plaintiff in an action for divorce, who in good faith marries after judgment in his favor which is subject to reversal on appeal, is not guilty of adultery in so doing; but the defendant is estopped, in a second action for divorce from asserting that the plaintiff committed adultery with the woman he married, in reliance upon the judgment. *Bailey v. Bailey*, 45 Hun, 278; 3 N. Y. St. Repr. 132.

Where, after judgment had been rendered by a decision in favor of the plaintiff, in an action for an absolute divorce on the ground of adultery, the plaintiff, with knowledge that the application is about to be made to open such default, remarries, the effect of such remarriage is not a good reason for denying the motion for a new trial, if the

circumstances connected with the default would otherwise justify the granting of such application. *Scripture v. Scripture*, 70 Hun, 432.

Remarriage in foreign state.

The statute and decree prohibiting the marriage of a guilty party can have no effect beyond the territorial limits of this state. Where the laws of another state do not prohibit such marriage by a party divorced, its validity cannot be questioned in this state. *Moore v. Hegeman*, 92 N. Y. 521.

In the case of *Van Voorhis v. Brintnall*, 86 N. Y. 18, it was held that the validity of the marriage contract is to be determined by the law of the state where it was entered into. If valid there it is to be recognized as such in the courts of this state, unless contrary to the prohibitions of natural law or the express prohibitions of the statute. In this case it appeared that a divorce had been granted to the wife on the ground of the husband's adultery, and it was decreed that it should not be lawful for him to marry again until after her death, and he afterwards and during her life married again in the state of Connecticut. By the laws of that state the marriage was valid and the decision in the case cited was that the marriage being valid by the laws of Connecticut, a child born from such marriage is legitimate and entitled to inherit. This case was followed in *Thorp v. Thorp*, 90 N. Y. 602.

Although a defendant divorced in this state is forbidden to marry, she may contract a common law marriage in another state where such marriages are valid, so as to entitle her to a standing as widow of the second husband. *Matter of Garner*, 59 Misc. Rep. 116; 112 N. Y. Supp. 212. On the subject of remarriage after divorce, see, *Foreign Divorces, post*, p. 239.

CHAPTER VI.

SEPARATION.

The law will not compel a husband to live with his wife, nor a wife with her husband.

But the law will not permit a husband to evade his duty to support his wife whether they live together or separate.

Hence if husband and wife have separated the law will enforce an agreement made by him to support his wife—i.e. to fulfill his legal duty.

But such agreement is void if made while the parties are living together.

The common law required such agreement to be made through the intervention of a trustee (as husband and wife being one person, could not contract with each other)—but the statute has abolished the legal fiction, and a trustee is no longer necessary.

A separation agreement between husband and wife made while they are separated and pending an action for separation is valid and an action may be maintained thereon although there was no legal cause for separation. *McCormack v. McCormack*, 127 App. Div. 406; 111 N. Y. Supp. 563.

The question of the validity of separation agreements has been more or less confused by remnants of the theory that husband and wife are one person, and by the more important fact that the law is opposed to any severance of the marital relation. Hence the doctrine that separation agreements are void if made while the parties are living together, although they may separate the following day and an agreement then made will be binding. There seems to be no sound reason

supporting the rule, save only the possibility of a reconciliation.

In the case of *Carson v. Carson*, 3 Paige, 483, the chancellor says: "It may well be doubted whether public policy does not forbid any agreement for a separation between husband and wife except upon the sanction of a court of justice; as whether it does not also require that such agreements should be limited to those acts where by the previous misconduct of one of the parties the other is entitled to have the marriage contract dissolved, either wholly or partially by a decree of a competent tribunal." In this case it was also held that an agreement of separation cannot be supported, unless the separation has already taken place or is to take place immediately upon the execution of the agreement. Such an agreement will be rescinded, if the parties afterward cohabit or live together as husband and wife by mutual consent for ever so short a time. See also *Rogers v. Rogers*, 4 Paige, 516; *Cropsey v. McKinney*, 30 Barb. 47; *Morgan v. Potter*, 17 Hun, 403; *Beach v. Beach*, 2 Hill, 260.

Trustee no longer necessary.

Since the enactment of the Domestic Relations Law the intervention of a trustee is not necessary to the validity of a separation agreement made between husband and wife at a time when they are living apart. *Spence v. Woods*, 134 App. Div. 182; 118 N. Y. Supp. 807. A wife may sue for the breach of her husband's agreement to support her made when the separation had already taken place. The intervention of a trustee is not necessary to the validity of such agreement. *Effray v. Effray*, 110 App. Div. 545; 97 N. Y. Supp. 286.

A contract for support made directly between husband and wife living apart because of the husband's cruel treatment, and stipulating also for a gross sum to be paid to the wife in satisfaction of all her rights in his estate is valid, does not violate public policy, nor the Domestic Relations Law. *Dower v. Dower*, 36 Misc. Rep. 559; 73 N. Y. Supp. 1080.

A bond given by a husband to his wife, reciting that they have just cause for living separately, and conditioned that the husband shall pay a certain sum weekly for the support, education and maintenance of

herself and children for the term of her natural life, is not void or contrary to public policy as being a contract between husband and wife to live apart. Nor is it in violation of section 21 of chapter 272 of Laws of 1896, as being a contract to dissolve the marriage and relieve the husband from liability and support where it appears that the wife had just cause and did not live with her husband for some time prior to the execution of the bond. *Lawson v. Lawson*, 56 App. Div. 535; 67 N. Y. Supp. 356.

Whenever a separation agreement relieves a husband from his duty to support his wife it is void. And it is also void if they be living together at the time of contract.

The Domestic Relations Law, § 51, (see *post*, p. 272) empowering a wife to contract with her husband, expressly provides that "a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife."

A separation agreement is void if the wife accepts the provision made by her husband in satisfaction of her support and maintenance and relieves him from claims upon his property and liability for her debts, as a married woman cannot contract to relieve her husband from his liability to support her. *Gray v. Butler*, 116 App. Div. 816; 102 N. Y. Supp. 106.

The section of the Domestic Relations Law, providing that a married woman may contract with any person, including her husband, does not enlarge the power of the husband and wife in respect to separation agreements. *Poillon v. Poillon*, 49 App. Div. 341, 63 N. Y. Supp. 301; affg. 29 Misc. Rep. 666, 61 N. Y. Supp. 582.

A separation agreement made when the parties were living together is void and unenforceable by the wife although there was a subsequent separation. *Sunderlin v. Sunderlin*, 123 App. Div. 421; 107 N. Y. Supp. 979.

A separation agreement made between husband and wife when living together, and there is no immediate intention to separate, is unenforceable. *Gray v. Butler*, 116 App. Div. 816; 102 N. Y. Supp. 106.

A separation agreement between husband and wife made while they are living together and looking toward a separation is void as against public policy. *Edic v. Horn*, 42 Misc. Rep. 26; 85 N. Y. Supp. 535.

While an agreement by a woman not to defend a foreign action for divorce in consideration of support by her husband is void as against public policy, yet where such agreement is made part of the foreign decree by a court having jurisdiction of the parties, the invalidity of the agreement cannot be asserted in an action brought by the wife in this state to recover sums due. *France v. France*, 79 App. Div. 291; 79 N. Y. Supp. 579.

When the separation agreement is void, security for its performance is also void.

Where a separation agreement between husband and wife is void because they were living together at the time of its execution, a mortgage given to a third party by the husband as collateral security for the wife's support is also void. *Perkins v. Perkins*, 130 App. Div. 193; 114 N. Y. Supp. 960.

As a separation agreement only takes its validity from the fact that the parties have separated, it becomes void when they afterwards become reconciled to the marital obligations.

Articles of separation between husband and wife, in which another joins with her as trustee, although valid when made, are rendered void by resumption by them of their conjugal relations. *Zimmer v. Settle*, 124 N. Y. 37. See, *Carson v. Carson*, 3 Paige, 483. A separation agreement is void if the parties live together for ever so short a time.

An agreement between a husband and wife that the wife shall live separate from him, in consideration of a promise to pay her an annual sum for her support, is against public policy, and revocable by either at pleasure, and, therefore, where her offer to return to him is refused by him and he does not provide for her support, she is entitled to a separation with alimony on the ground of abandonment and non-support. *Gilbert v. Gilbert*, 26 N. Y. Supp. 30.

The conveyance of property to a third person by a husband, who has separated from his wife, for the purpose of her support during her life, to be conveyed to the husband's heirs-at-law should he predecease her,

creates an irrevocable power in trust. The power to be exercised in favor of the heirs is irrevocable, but it seems that the wife's right under the trust deed are not affected by her subsequent cohabitation with her husband. *Smith v. Terry*, 38 App. Div. 394; 56 N. Y. Supp. 447, *affd.*, 166 N. Y. 632.

The modern tendency is to treat the agreement, when valid, like any other contract.

- (1) It survives the husband's death in the absence of provision to the contrary.
- (2) It is not annulled by a divorce or a decree awarding alimony, though it will be considered in fixing the amount of alimony.
- (3) The husband is bound irrespective of his ability to pay.
- (4) It is assignable by the wife.

While alimony abates at the death of the husband his voluntary agreement to support his wife for her life does not abate, even though it be not expressly stated to be binding on his legal representatives. *Barnes v. Klug*, 129 App. Div. 192; 113 N. Y. Supp. 325.

Where a separation agreement survives the husband's death the wife may sue in equity for a decree setting aside a fund sufficient to meet the payments, as the surrogate cannot make such decree and a legal action for each installment would not prevent a distribution of the estate. *Barnes v. Klug*, 129 App. Div. 192; 113 N. Y. Supp. 325.

Adultery of wife, divorce, alimony.

A separation of agreement is binding upon the husband although a decree for alimony has been entered in an action for divorce. *Chamberlain v. Cuming*, 99 App. Div. 561; 91 N. Y. Supp. 105; *affd.* 184 N. Y. 526.

Such contract, being at its execution valid and binding, is not invalidated by a subsequent violation of the marriage vow on the part of the wife. Nor do the considerations supporting it fall upon the granting of a decree of divorce. After making the contract it is not in the power of either

party, acting alone, and against the will of the other, to destroy its effect. *Galusha v. Galusha*, 116 N. Y. 635.

In *Clark v. Fosdick*, 118 N. Y. 7, a husband and wife agreed to live separately, and, to effectuate that agreement, entered into articles of separation through the medium of a trustee, by the terms of which the husband agreed to pay to the trustee annully a sum named for the support of the wife during life, the sum to be in full satisfaction for such support and maintenance and of all alimony. The wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon the execution of the agreement the parties separated. In an action against the husband, to recover the payment under the agreement, it was held that, the trustee named was the trustee of an express trust, and that the action was properly brought in his name, and that the agreement was not abrogated by the subsequent divorce of the parties.

Inability of husband to fulfill contract.

A husband is bound to pay the sum named in a separation agreement although his financial circumstances have changed for the worse. *Chamberlain v. Cuming*, 99 App. Div. 561; 91 N. Y. Supp. 105; *affd.* 184 N. Y. 526.

Assignment by wife.

A valid separation agreement providing for the support of a wife is assignable and a suit may be maintained thereon by the assignee. *Spence v. Woods*, 134 App. Div. 182; 118 N. Y. Supp. 807.

The separation agreement is unenforceable by the wife if she make a breach of the obligations assumed by her.

Where a separation agreement entitles the husband to see his children weekly the wife by unnecessarily taking them to Europe for a period of six months violates the agreement and her trustee cannot recover from the husband the amount he was to pay his wife under such agreement. *Muth v. Wuest*, 76 App. Div. 332; 78 N. Y. Supp. 431.

Where a separation agreement provided that the wife

should have the custody of the children, but it was agreed on her part and that of the trustee named, who was a party of the third part to the agreement, that the husband should have the right to visit and associate with his children in the manner specified therein, it was held, in an action to recover the payment stipulated by the contract, to be made by the husband to the trustee for the benefit of the wife, that the agreement permitting the husband to associate with his children was a material part of the contract, which could not be violated by the wife and a recovery sustained for her benefit for the sum stipulated to be paid by the husband. *Duryea v. Bliven*, 122 N. Y. 567.

An agreement by a husband in consideration of the withdrawal of an action for separation instituted by the wife that should he cease to live with her or support her, she shall immediately become vested with a dower interest in his property, is based upon a good consideration and is not in contravention of the Domestic Relations Law. The failure of the wife to perform her marital obligations would be a defense to an action on such promise. *Sommer v. Sommer*, 87 App. Div. 434, 84 N. Y. Supp. 444.

Actions on separation agreement, jurisdiction, parties, rescinding agreement, etc.

The Supreme Court has no jurisdiction without the consent of the husband or trustee to remove such trustee appointed under an agreement of separation between husband and wife. *Hughes v. Cuming*, 165 N. Y. 91.

An action on a valid separation agreement made by husband and wife when living apart, it not necessarily in equity, and the Municipal Court of the city of New York has jurisdiction. *Reardon v. Woerner*, 111 App. Div. 259; 97 N. Y. Supp. 747.

Although a separation agreement has been made through the intervention of a trustee, the wife is the real party in interest and may sue thereon in her own name and join

the trustee as defendant, especially where he contends that the agreement was terminated by the death of the husband. *Barnes v. Klug*, 129 App. Div. 192; 113 N. Y. Supp. 325.

The rule that contracts between husband and wife are only upheld in equity, when they are fair, applies to a separation agreement, which is found to afford an inadequate remedy for the support of the wife, and was executed by her unadvisedly and imprudently. She may rescind the agreement upon restoring to her husband so much of the consideration as she has not expended for her support. *Hungerford v. Hungerford*, 161 N. Y. 550.

Where a trustee sues a husband to recover the balance due on a separation agreement, and the husband answers, praying that the agreement be canceled because of the change in the circumstances of himself and his wife, the court may, upon motion of defendant, order that the wife be brought in as a party defendant unless she elects to appear as plaintiff. *Chamberlain v. Cuming*, 65 App. Div. 474; 72 N. Y. Supp. 928.

In *Lord v. Lord*, 68 Hun, 537; 52 N. Y. St. Repr. 563; 22 N. Y. Supp. 1004, the agreement of separation contained no express covenant to pay any sum to the wife, but did covenant to pay a certain annual sum to the trustee for the wife's support, and the trustee agreed to indemnify the husband for the wife's debts; it was held, that the wife could not maintain an action against the husband to enforce his covenant to pay the money to the trustee, but that the trustee, as trustee of an express trust, within section 449 of the Code of Civil Procedure, is entitled to maintain such an action.

An instrument by which the husband promises to pay his wife one-fourth of his future income in lieu of alimony does not operate as an equitable assignment of the interest of the husband's future earnings, but is only a promise to pay a portion of such earnings as they may accrue. The court will not take the after-acquired property of the husband into possession by means of a receiver. *Netling v. Netling*, 60 App. Div. 409; 69 N. Y. Supp. 984.

A husband who pursuant to a separation agreement conveyed lands to his wife in consideration of a release by her of her right to support cannot maintain an action to set aside the conveyance and to compel the wife to secure him against liability for her debts. *Holihan v. Holihan*, 79 App. Div. 475; 80 N. Y. Supp. 44.

A wife may recover on the breach of a separation agreement by

which her husband agreed to support her daughter by a former marriage although the daughter has become of age. *Effray v. Effray*, 110 App. Div. 545; 97 N. Y. Supp. 286.

ACTION FOR SEPARATION.

Although either party to a marriage may, of his or her own will, separate from the other, an action lies to compel a separation, and to establish and measure the husband's duty to support his wife and children.

This action does not sever the marriage tie, but merely divorces the parties *a mensa et thoro*—from bed and board.

The statute attempts to enumerate the grounds for the action; but it is probable that the equities prevail.

Code Civ. Proc. § 1762. For what causes action may be maintained.

In either of the cases specified in the next section, an action may be maintained, by a husband or wife, against the other party to the marriage, to procure a judgment, separating the parties from bed and board, forever, or for a limited time, for either of the following causes:

1. *The cruel and inhuman treatment of the plaintiff by the defendant.*
2. *Such conduct, on the part of the defendant towards the plaintiff, as may render it unsafe and improper for the former to cohabit with the latter.*
3. *The abandonment of the plaintiff by the defendant.*
4. *Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.*

Code Civ. Proc. § 1763 Id. ; in what cases.

Such an action may be maintained, in either of the following cases:

1. *Where both parties are residents of the State, when the action is commenced.*
2. *Where the parties were married within the State, and the plaintiff is a resident thereof, when the action is commenced.*

3. *Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced.*

Nature of action for separation.

An action for a separation is really an appeal to a court of equity by one of the parties to a marriage contract for a modification of the marriage relations, duties and obligations. The court is virtually asked to change and readjust these relations and to prescribe such new duties and obligations to be observed by the litigants as justice may require. *People ex rel. Comrs. of Charities v. Cullen*, 153 N. Y. 629, 637.

By the terms of the statute a judgment separating the parties from bed and board may be forever or for a limited time.

The first statute in this state authorizing a divorce *a mensa et thoro* was passed on 13th of April, 1813. By this act such divorces were only granted on the application of the wife. Under this statute it was held that a decree of separation should be made perpetual with the proviso that the parties may, at any time, by their mutual and voluntary act, apply to the court for leave to be discharged from the decree. *Barrere v. Barrere*, 4 Johns. Ch. 187.

The plaintiff in order to maintain the action must prove:

(1) **A valid existing marriage**

(2) **The residence prescribed by the statute.**

There is no statute of limitations.

Marriage.

One suing for a separation must establish a valid and existing marriage. *Dietrich v. Dietrich*, 128 App. Div. 564; 112 N. Y. Supp. 968. A decree of separation must be founded upon a marriage valid where celebrated. No decree can be granted where the alleged wife recovered judgment against her husband in the foreign jurisdiction for his failure to carry out his promise to marry her. *Kresch v. Kresch*, 58 Misc. Rep. 461; 111 N. Y. Supp. 437.

A binding common law marriage is not established where it appeared that the plaintiff had previously entered into a ceremonial marriage with another person whom she deserted to take up meretricious re-

lations with the defendant and there is no proof that the former husband was dead or presumption thereof by reason of the elapse of seven years at the time of the alleged second marriage. *Dietrich v. Dietrich*, 128 App. Div. 564; 112 N. Y. Supp. 968.

Residence.

Both husband and wife must in fact be residents of the state, except as provided in subdivisions 2 and 3, and the theoretical residence of the wife, presumed to follow that of the husband, is not sufficient to enable him to bring the action, where she never has been actually such resident. *Hewes v. Hewes*, 40 N. Y. St. Repr. 680; 16 N. Y. Supp. 119.

The question whether one has ceased to be a resident of this country and has become a resident of a foreign country is dependent upon his intention, and his residence, for the purpose of this section, is a permanent abode rather than a temporary residence. *De Meli v. De Meli*, 120 N. Y. 485.

A married woman may have a domicile in a jurisdiction other than that of her husband when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so, but the right to do so springs from the necessity of its exercise. *Atherton v. Atherton*, 82 Hun, 179; 64 N. Y. St. Repr. 798; 31 N. Y. Supp. 977; *affd.* 155 N. Y. 130.

Where a marriage took place in this state which was the matrimonial domicile of both the husband and wife the latter may sue for a separation although the husband has left the state and jurisdiction may be acquired on service by publication. *Woolworth v. Woolworth*, 115 App. Div. 405; 100 N. Y. Supp. 868.

A woman may maintain an action for separation in this state if though the parties married without the state, they afterwards became residents of the state, continued to be

such for a year and the plaintiff is a resident when the action is commenced.

Where the complaint in an action for separation against a non-resident defendant states facts giving jurisdiction to the court, an order for service by publication should not be set aside on the defendant's affidavits stating that the parties never acquired a matrimonial domicile in this state. The jurisdictional questions should be determined upon trial and not by affidavit. *Barber v. Barber*, 137 App. Div. 665; 122 N. Y. Supp. 452.

An action for separation may be maintained where both parties reside in this state when the action is commenced irrespective of the length of time they resided here. *Ensign v. Ensign*, 54 Misc. Rep. 289; 105 N. Y. Supp. 917; *affd.* without opinion, 120 App. Div. 882; 105 N. Y. Supp. 1114.

When both parties are residents of the state when the action is commenced for separation, it may be maintained without reference to the time during which either of them may have resided in the state. But it seems that where the marriage took place within the state and where the plaintiff is a resident when the action is commenced he may maintain the same against a non-resident defendant without reference to the length of time of the plaintiff's residence and without showing that the defendant ever resided within the state. It seems also that where the parties were married without the state, the plaintiff may maintain such action against a non-resident only when the parties have at some time been residents of the state for at least one year, and the plaintiff must be a resident when the action is commenced. *Bierstadt v. Bierstadt*, 29 App. Div. 210; 51 N. Y. Supp. 862, distinguishing *Ramsden*, 28 Hun, 285.

An action for separate maintenance cannot be maintained where the marriage took place within the state, and the wife has not resided in the state one year before bringing the action. *Ramsden v. Ramsden*, 28 Hun, 285; *affd.*, 91 N. Y. 281.

Where the parties were married and lived in another state, and the husband moved to New York, the wife refusing to follow him, he cannot sue her for separation. *Toosey v. Toosey*, 14 Daly, 537.

Limitation of action.

There is no statutory provision as to delay in bringing a

suit for a limited divorce, although in peculiar cases a long delay might lead to its dismissal. *Burr v. Burr*, 10 Paige, 20.

Cruelty which warrants a decree of separation may be either physical violence, or acts causing mental suffering.
It would be idle to attempt to formulate a rule, as each case seems to be measured on its merits. The susceptibility of the plaintiff to suffering is considered.

There is no exact criterion of cruel and inhuman treatment, which entitles a wife to a decree of separation. Cruel and inhuman treatment by a husband depends upon the temperament, breeding and condition of life of the parties, together with a variety of special circumstances. The Appellate Court will not overthrow the findings of the trial court in the absence of legal error. *Tower v. Tower*, 134 App. Div. 670; 119 N. Y. Supp. 506.

Cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of her husband. The conduct of the husband may produce such mental agony in the wife as to be even more cruel and inhuman than any mere physical pain which was inflicted, and where the conduct of the husband towards the wife is of such a character, it justifies the court in freeing her from the necessity of submission to such treatment. *Atherton v. Atherton*, 82 Hun, 179; 64 N. Y. St. Repr. 798; 81 N. Y. Supp. 977; *affd.* 155 N. Y. 130; reversed on other grounds, 181 U. S. 155.

The earlier cases were less indulgent to the wife, and looked chiefly to physical violence as a ground for separation; but the modern cases lay as much, if not greater stress, on acts causing mental suffering.

False Charges of Adultery.

A wife is entitled to a decree of separation for cruel and

inhuman treatment on proof that on several occasions her husband beat and kicked her and falsely accused her of adultery and other misconduct. *McNulty v. McNulty*, 119 App. Div. 150; 104 N. Y. Supp. 251. It may be cruel and inhuman treatment for a husband to charge his wife with unfaithfulness in the hearing of their children and other persons. *Smith v. Smith*, 92 App. Div. 442; 87 N. Y. Supp. 137.

But it is not cruel to charge a wife with infidelity if there be ground for suspicion. *Kennedy v. Kennedy*, 73 N. Y. 396.

Charges of infidelity, made in bad faith, as auxiliary to and in aggravation of threatened violence are sufficient to constitute "cruel and inhuman treatment." *Kennedy v. Kennedy*, 73 N. Y. 369. Such charges would not authorize a separation, unless they were made in bad faith and without any ground for believing them to be true. *De Meli v. De Meli*, 67 How. Pr. 20.

In the case of *Straus v. Straus*, 67 Hun, 491; 50 N. Y. Repr. 845; 22 N. Y. Supp. 567, it appeared that the defendant, without reasonable cause, falsely and repeatedly accused the plaintiff of being an unchaste woman. The court said: "Such an accusation constitutes cruel and inhuman treatment, and is sufficient to justify a judgment of separation even if no other ground of complaint exists. Such a charge, if false, and made without sufficient cause, as found in this case, is more cruel than blows or any mere physical violence." Charges of unchaste conduct made in the presence of her children justify a limited divorce to the wife. *Lutz v. Lutz*, 31 N. Y. St. Repr. 718. See also *Israel v. Israel*, 54 App. Div. 408; 66 N. Y. Supp. 777.

Cruel and inhuman treatment may consist of continuous verbal outrage. Where the defendant denounced the plaintiff as a "cur," a "worm," a "devil," whom he consigned to "hell," and, under circumstances of peculiar atrocity, he maliciously and unjustifiably impugned her conjugal fidelity, it is sufficient to authorize a judgment in favor of the plaintiff. *Fitzpatrick v. Fitzpatrick*, 21 Misc. Rep. 378; 47 N. Y. Supp. 737.

Frequent charges of infidelity of the wife with various men, naming them, and calling her opprobrious names, using her with violence and menacing her, are sufficient to justify a decree of separation. *Waltermire v. Waltermire*, 110 N. Y. 183.

Miscellaneous Cases.

Cruelty is a wrongful act or omission, by one of the parties, inconsistent with the discharge of the duties of married life, and may be either: 1. An act causing or threatening personal injury to life, limb or health; 2, Words inflicting indignity and threatening pain, which does not include mere words of abuse, though it may mean opprobrious words by way of aggravation; 3, In general, a wrongful act or acts plainly subversive of the marriage relation, and making it impossible that the duties of married life be properly discharged. *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236.

For a case where the allegations of cruel and inhuman treatment were held sufficient to support complaint in action for separation and demand for alimony and counsel fees, see *Itzkowitz v. Itzkowitz*, 33 App. Div. 244; 53 N. Y. Supp. 356.

Cruel and inhuman treatment does not necessarily imply such as places a wife in physical fear of her husband. *Lutz v. Lutz*, 31 N. Y. St. Repr. 718.

A husband who, in the presence of his wife, and in spite of her entreaties, unmercifully beats her child, inflicts an injury to her feelings which is cruel and inhuman within the meaning of the statute. *Bihin v. Bihin*, 17 Abb. Pr. 19.

Words of menace accompanied by a probability of bodily violence are sufficient to warrant a decree. *Whispell v. Whispell*, 4 Barb. 217.

For circumstances under which it was held to be cruel and inhuman treatment to compel a young wife, prior to the birth of her child, to do heavy housework, coupled with abuse, lack of clothing, and refusal to allow her to visit her parents, etc., see *Gloster v. Gloster*, 23 App. Div. 336; 48 N. Y. Supp. 160.

Quarrels due to marital incompatibility, the frequent intoxication of the husband, the extravagance of or forgery by the wife, and other matrimonial inconveniences, are not grounds for a decree of separation.

Occasional and even frequent intoxication is not of itself ground for a separation; nor do occasional sallies of passion, from whatever cause, amount to legal cruelty, so long as they do not threaten bodily harm. *Mason v. Mason*, 1 Edw. Ch. 278; *Solomon v. Solomon*, 3 Robt. 369.

Nor is the act of the husband in angrily expelling his wife from home, under suspicion of her unfaithfulness, a sufficient ground. *Barlow v. Barlow*, 2 Abb. Pr. N. S. 259.

Nor is the husband's refusal to permit his wife to attend a church of which she is a member sufficient. *Lawrence v. Lawrence*, 3 Paige, 267.

Meanness or disagreeable conduct or vile language is not sufficient. *McBride v. McBride*, 31 N. Y. St. Rep. 631; 9 N. Y. Supp. 827. Nor is demeanor provoking annoyance, discontent and disgust. *Conklin v. Conklin*, 17 Abb. Pr. 20.

A husband will not be granted a decree of separation on the ground of cruel and inhuman treatment because his wife is extravagant and has forged his name and that of other persons upon a promissory note and has pledged his credit without authority in the absence of proof that she was actuated by a malevolent feeling toward him or of such conduct as renders it unsafe and improper for him to cohabit with her. *Weaver v. Weaver*, 74 App. Div. 591; 77 N. Y. Supp. 568; *affd.* 178 N. Y. 621.

A separation cannot be adjudged merely because there is no possibility of the parties living together in harmony. *Davis v. Davis*, 1 Hun, 444. See also *Ruckman v. Ruckman*, 58 How. Pr. 278.

A threat, not giving rise to any apprehension of immediate personal injury, does not constitute legal cruelty. *Anonymous*, 17 Abb. N. C. 231.

A refusal to allow a wife to name a child is not cruel treatment. *Appleby v. Appleby*, 2 Civ. Proc. Rep. 422.

Where a husband committed his wife to an insane asylum, she having been subject to delusions and suffering from insanity, etc., it was held that this was not cruel and inhuman treatment upon which to found an action for separation. *Kuster v. Kuster*, 37 Misc. Rep. 136; 74 N. Y. Supp. 853.

There are but few decisions under the clause allowing a decree of separation for conduct making it "unsafe and improper" for the plaintiff to live with the defendant.

It would seem, however, to give the court the broadest equitable powers.

The word unsafe in the statute has reference to bodily personal injury or violence to physical health, as distinguished from mental suffering or wounded sensibilities, and the proofs must show either bodily violence, or acts and conduct such as may render it unsafe for a wife to cohabit with her husband. *Walton v. Walton*, 32 Barb. 203; 20 How. Pr. 347; *Davies v. Davies*, 55 Barb. 130; 37 How. Pr. 45.

Words of menace are sufficient to warrant a decree if they be of such a character and accompanied by such circumstances as to justify a belief in their seriousness. That is, they must impress the person to whom they are addressed, not as idle words, nor as a form of intemperate expression, but as importing action, and in that sense continuing the reality of a threat of bodily harm. *Ruckman v. Ruckman*, 58 How. Pr. 278.

A mere allegation of adultery does not state a cause of action for separation under section 1762 of the Code of Civil Procedure. *Allen v. Allen*, 125 App. Div. 838; 110 N. Y. Supp. 303.

Cruel and unsafe mean the same thing as unkind treatment accompanied by words of menace creating a reasonable apprehension of bodily injury. *Mason v. Mason*, 1 Edw. Ch. 278.

If either spouse abandons the other with an intention not to return, it is ground for a decree of separation.

The wife may sue for separation if the husband neglects or refuses to provide for her.

The term abandonment, used in the law of divorce, contemplates a voluntarily separation of one party from the other, without justification, with the intention of not returning. *Williams v. Williams*, 130 N. Y. 193; *Simon v. Simon*, 6 App. Div. 469, 39 N. Y. Supp. 573, affd. 159 N. Y. 549.

Abandonment, in the sense in which it is used in the statute, means the actual and wilful desertion by the husband of the wife. It is the wilful act of actually leaving her, or separating from her, and the withdrawal of all aid and protection implied in the marriage relations. If the wife herself procures the separation, or consents to it, the case does not come within the statute. It cannot be the result of an agreement or effected by the judgment of a court, but must be what is known to the criminal law as wilful and voluntary desertion or abandonment. *People ex rel. Comm'rs of Charities v. Cullen*, 153 N. Y. 629, 638.

Where a woman remarried after the absence of her husband for five years, without being known to be alive, the marriage is voidable only, and thus she may maintain an action for separation against her second husband for abandonment, if after knowledge of the death of her first husband he continues to live with her for a term of years. *Taylor v. Taylor*, 25 Misc. Rep. 566; 55 N. Y. Supp. 1052; *affd.* 68 App. Div. 638.

If it appears that the abandonment of which the plaintiff complains was caused by continued personal violence and insulting language, she is entitled to a judgment for a separation and reasonable support. *Waltermire v. Waltermire*, 110 N. Y. 183.

A husband who drives his wife from his home merely because she will not promise not to go near her parents, is guilty of a legal abandonment. *Gloster v. Gloster*, 23 App. Div. 336; 48 N. Y. Supp. 160.

Abandonment excludes the consent of the parties and involves a final and determinate renunciation of cohabitation. This must be shown by satisfactory proof, and the burden of proof is upon the plaintiff. *Dignan v. Dignan*, 17 Misc. Rep. 268; 40 N. Y. Supp. 320.

No one can desert who does not actually and wilfully

bring to an end an existing state of cohabitation. If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes from that moment impossible to either, at least until their common-law life and home have been resumed. *People ex rel. Comm'rs of Charities v. Cullen*, 153 N. Y. 629, 638, citing *Fitzgerald v. Fitzgerald*, L. R. (1 P. & D.) 684.

There must be a final departure without sufficient reason therefor, and without the consent of the other party, and with the intention of not returning. *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236.

A determined purpose of a husband to withdraw from his wife permanently and withhold his support are both necessary to a judgment for abandonment. *Ruckman v. Ruckman*, 58 How. Pr. 278; *Atwater v. Atwater*, 53 Barb. 621.

Where the husband and wife separated pursuant to an agreement, void as against public policy, and the wife subsequently offered to return to the husband's bed and board, which offer he refused, and also refused to support her, it is sufficient to constitute an abandonment and neglect or refusal to support within the meaning of this section. *Gilbert v. Gilbert*, 5 Misc. Rep. 555, 26 N. Y. Supp. 30.

A finding that both parties to an action of divorce were guilty of adultery does not relieve the husband from his duty to support his wife, nor does it bar a subsequent action brought by her for separation on the ground of abandonment. *Hawkins v. Hawkins*, 110 App. Div. 42; 96 N. Y. Supp. 804.

Abandonment and Failure to Support are Separate Offenses.

A cessation by a husband from living with his wife, with a fixed determination not to resume such relation, and the absence of her consent to such separate living, and no conduct on her part justifying her husband's withdrawal, amounts to an abandonment and justifies an action by the wife for a separation, although the husband had continued to provide for the support of the wife, and her infant children. *Clearman v. Clearman*, 15 Civ. Proc. Rep. 313; 18 N. Y. St. Repr. 272.

Where no Abandonment.

Where, after separation by agreement, followed by repeated negotiations for a return to each other which were continued by both parties

down to the time of the commencement of the suit for a judicial separation, there is not such an abandonment as will support a decree of limited divorce. *Simon v. Simon*, 6 App. Div. 469, 39 N. Y. Supp. 573; *affd.*, 159 N. Y. 549.

Where a husband induced his wife to obtain a divorce in a foreign state and having learned that the decree was invalid invited her to return to him, the fact that she refused to do so does not establish an abandonment by her. *People ex rel. Elder v. Elder*, 98 App. Div. 244; 90 N. Y. Supp. 703.

A husband's refusal to remain in the house of his wife's father, when she declines to live with him, except there, is not an abandonment. *Appleby v. Appleby*, 2 Civ. Proc. Rep. 422.

Where by antenuptial agreement the prospective wife agreed to release her prospective husband from all claims to support, and it was the intention of the parties that they should not live together, the wife cannot maintain an action for separation on the ground of abandonment without showing an attempt to induce her husband to live with her or effort on her part to live with him. But if the husband made no agreement to provide for his wife as a consideration for his promise the contract is void as against public policy and is no defense to the wife's action for separation. *Dennison v. Dennison*, 52 Misc. Rep. 37; 102 N. Y. Supp. 621.

Offer to Support After Action Brought.

In an action for separation the court cannot compel the plaintiff to accept her husband's offer to provide a suitable home. *Mossa v. Mossa*, 123 App. Div. 403; 107 N. Y. Supp. 1046.

A wife is entitled to a decree of separation for abandonment and non support although since the husband abandoned her she has decided not to go back to him. *Curtin v. Curtin*, 111 App. Div. 447; 97 N. Y. Supp. 771.

DEFENSES TO ACTION FOR SEPARATION.

As a defense the defendant may disprove the charges made by the plaintiff; may show that the offense has been forgiven, or, though admitting the offense, may justify it by showing the misconduct of the plaintiff.

Moreover the defendant, as a counterclaim, may state a cause of action against the plaintiff for a separation or for divorce.

Code Civ. Proc. § 1785. Defendant may set up plaintiff's misconduct.

The defendant may set up, in justification, the misconduct of the

plaintiff; and if that defense is established to the satisfaction of the court, the defendant is entitled to judgment.

Code Civ. Proc. § 1770. What is deemed a counterclaim.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, a cause of action, against the plaintiff and in favor of the defendant arising under either of said articles, may be interposed, in connection with a denial of the material allegations of the complaint, as a counterclaim.

Condonation.

Condonation is a conditional forgiveness; a repetition of cruelty revives the injury. *Smith v. Smith*, 4 Paige, 432.

Cruelty of the husband to his wife which has been condoned will be revived by subsequent acts of cruelty which of themselves would not be sufficient to justify a separation; the condonation of the prior offense is always subject to the condition that the husband shall thereafter treat the wife with conjugal kindness. *Atherton v. Atherton*, 82 Hun, 179, 64 N. Y. St. Repr. 728; 31 N. Y. Supp. 977; *affd.* 155 N. Y. 130; reversed on other grounds, 181 U. S. 155.

Slighter misconduct than would constitute an original ground for separation will revive former injuries so as to authorize a separation. *Whispell v. Whispell*, 4 Barb. 217; *Burr. v. Burr*, 10 Paige, 20.

The cruelty which constitutes a ground for a decree of separation is generally a course of conduct, not a single act; and subsequent sexual cohabitation is not a condonation of an act of cruelty in the sense that it is of an act of adultery. Even where there has been a forgiveness of previous acts of cruelty sufficient to bar an action, proof of such previous cruelty is competent on the trial of the action for separation for the purpose of giving character to subsequent acts, and showing that they arose from a settled purpose and not from impulse. *Doe v. Doe*, 52 Hun, 405; 24 N. Y. St. Repr. 364; 5 N. Y. Supp. 514; *Cox v. Cox*, 5 N. Y. Supp. 367, 23 N. Y. St. Repr. 691.

An offer by a wife to return to her husband and live with him, made pursuant to an order of court for her support in lieu of an allowance, or if not accepted or made upon conditions which the husband does not comply with, is not a condonation of the previous cruel treatment and abandonment of her. Condonation, to be effectual, must be an act in which both husband and wife assent and participate. *Betz v. Betz*, 2 Robt, 694; 19 Abb. Pr. 90.

Misconduct of Plaintiff.

The adultery of a wife is misconduct which constitutes a defense in an action brought by her for separation and support and the fact that the wife has successfully defended an action for divorce brought by her husband upon the ground that he too was guilty of adultery does not change the rule. *Hawkins v. Hawkins*, 193 N. Y. 409.

In an action for separation brought by a wife on the ground of cruel and inhuman treatment; the husband may show the conduct of his wife during their previous married life and is not limited simply to proof of contemporaneous acts. *Powers v. Powers*, 84 App. Div. 588; 82 N. Y. Supp. 1022.

The enactment of section 1765 is the adoption of the principle of compensation or recrimination. The plaintiff shall not have relief if he has himself violated the marriage contract. *Doe v. Doe*, 23 Hun, 19. In this case the defendant set up as a defense the adultery of the plaintiff. The court held that adultery was misconduct, which, if proved, would defeat the plaintiff's right to a judgment and refuse to follow the cases of *Terhune v. Terhune*, 40 How. Pr. 258, and *Henry v. Henry*, 17 Abb. Pr. 411; 27 How. Pr. 5, where it was held that an allegation of adultery was not a good defense. Judge Learned remarked that the court in the latter cases must have overlooked the section from which the above section of the Code was derived. See *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236.

In an action for limited divorce, on the ground of cruel and inhuman treatment, it has always been deemed important for the court to know what has been the conduct of the wife towards the husband as well as what his conduct has been towards her. *Rose v. Rose*, 52 Hun, 154; 22 N. Y. St. Repr. 526; 4 N. Y. Supp. 856, citing *Hopper v. Hopper*, 11 Paige, 46. In this case the court said: "This seems to be a self-evident proposition, because the question whether the treatment is cruel and inhuman, and is of such a character as to render it unsafe to even live with the husband, depends very largely upon the circumstances which gave rise to such ill-treatment. If it appears that, had the wife performed her duties towards her husband, she would have suffered no ill-treatment at his hands, it is difficult to understand upon what principle a court of equity could grant a relief." It is the policy of the law not to grant a separation or divorce for slight and trivial causes. When the parties have deliberately entered into such relations it is incumbent upon them to do everything in their power to make the union a happy one. *Burke v. Burke*, 75 Hun, 412; 27 N. Y. Supp. 67.

A separation on the ground of cruelty should be denied where it appears that the wife provoked her husband by persisting in associating with a man to whom he objected and by visiting him at his room. *Taylor v. Taylor*, 26 N. Y. Supp. 246.

Any misconduct which is calculated to irritate and provoke the defendant, or to excite his jealousy, or to alienate his affections from the plaintiff may be set up in his answer. *Hopper v. Hopper*, 11 Paige, 46; *Crow v. Crow*, 7 Civ. Proc. Rep. 423.

It is sufficient if the ill-conduct of the plaintiff causes the cruelty or abandonment on the part of the defendant, unless the acts of the defendant were so disproportionate to those on the part of the plaintiff as to render them wholly unjustifiable. *Palmer v. Palmer*, 29 How. Pr. 390. In this case it was also held that if the defendant establishes

the plaintiff's misconduct, the court is precluded from awarding alimony to the plaintiff and disposing of the custody of the children.

Provocation which led to the cruelty is a defense; *Devaismes v. Devaismes*, 3 Civ. Proc. Rep. 124, and so is misconduct, not the cause of the cruelty complained of, as are acts of violence on the part of the plaintiff towards defendant's children. *Crow v. Crow*, 7 Civ. Proc. Rep. 423.

Without reference to the validity of a separation agreement, the fact that the wife voluntarily left her husband and continued to live apart from him for a consideration furnished by him and accepted by her is a complete answer to the charge of abandonment by the husband. *Desbrough v. Desbrough*, 29 Hun, 592.

An allegation in an answer to the effect that at the time of the plaintiff's alleged marriage to the defendant she was the wife of another man, then living, from whom she had never been divorced, but whose lawful wife she then was, is sufficient. *Clark v. Clark*, 5 Hun, 340. See § 1770 (*post*, p. 147) as to what is deemed a counterclaim.

Adultery of the wife is a defense in an action brought by her for separation on the ground of cruel and inhuman treatment. *Israel v. Israel*, 54 App. Div. 408; 66 N. Y. Supp. 777.

The conduct of a wife in refusing to cohabit with her husband, and in persisting in seeing a former paramour, whose company she had promised to forego, is sufficient justification for the husband leaving her and in refusing to support her, and is an answer to her action for separation on such grounds. *Deisler v. Deisler*, 59 App. Div. 207; 69 N. Y. Supp. 326.

Where an action is brought by a woman for separation from her second husband, the latter is not entitled to a decree annulling the second marriage on the ground that the plaintiff's first husband was living at the time of such marriage, where it appears that the defendant has lived with her for more than ten years after obtaining knowledge of the fact that her former husband was not dead at the time of the second marriage. As to whether such counterclaim is proper in an action for separation, *quaere* *Taylor v. Taylor*, 63 App. Div. 231; 71 N. Y. Supp. 411; *aff'd* 173 N. Y. 286.

It is no defense to an action for separation that the plaintiff's wife prior to her marriage had falsely stated that she was a person of good moral character, and hence, the defendant is not entitled to examine a witness before trial to preserve testimony to that effect. *Gould v. Gould*, 125 App. Div. 375; 109 N. Y. Supp. 910.

RELIEF GIVEN IN A DECREE OF SEPARATION.

A decree of separation does not sever the marriage tie, but

adjusts and determines the rights and obligations of the parties.

If the wife succeed, the court may compel the husband to pay her alimony and to provide for the maintenance of the children of the marriage, which decree may be entered, even if a separation be refused.

If the decree of separation be in favor of the husband, he cannot be required to support his wife, as she has forfeited her rights.

Wherever a separation is decreed the court must, as in the case of divorce, make provision respecting the custody of the children of the marriage.

Code Civ. Proc. § 1766. Support, maintenance, etc., of wife and children.

Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties. And the court may, in such an action, render a judgment, compelling the defendant to make the provision specified in this section, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

See further, Final Judgment, Post, p. 174.

When a judicial decree of separation from bed and board has once been pronounced, the common-law obligation to support the wife, if not entirely abrogated, is greatly modified. Alimony then becomes the regular measure of the husband's obligation. It is granted or withheld always in furtherance of justice, and the amount is regulated by the exercise of a sound discretion, according to the circumstances of the parties. When the marriage bond was modified by the decree of separation, the legal obligation to support the

wife in the sense that it existed before ceased, and in its place was substituted the power of the court to appropriate some part of the property or earnings of the husband to that purpose as justice might require. *People ex rel. Comm'rs of Charities v. Cullen*, 153 N. Y. 629, 636, citing *Kamp v. Kamp*, 59 N. Y. 212; *Romaine v. Chauncy*, 129 N. Y. 566; *Galusha v. Galusha*, 116 N. Y. 635; *Wetmore v. Wetmore*, 149 N. Y. 520; *Schouler on Husband & Wife*, § 118; *Parsons on Contracts*, vol. 2, p. 85; *Tyler on Infancy and Coverture*, § 700, p. 924.

The court, after it has denied the principal relief sought on the ground that the evidence failed to show facts to establish any of the causes for which a separation can be adjudged, has no power to give judgment awarding the custody of the children of the marriage to the plaintiff, and making provision for their maintenance out of the property of the husband; upon failure of the plaintiff to make out a case for a divorce, the defendant is entitled to judgment dismissing the complaint. *Davis v. Davis*, 75 N. Y. 221.

In the case of *Ramsden v. Ramsden*, 91 N. Y. 281, where the wife's complaint alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance, it was held that the court had no power to grant an allowance for counsel fees or alimony *pendente lite*. The court said that "In *Atwater v. Atwater*, 36 How. Pr. 431, 53 Barb. 621, the General Term held that the statute did not authorize a complaint to be filed by a wife for her support and maintenance by her husband, as a distinctive substantial relief. This was, we think, the true construction of the statute then in question, and the one now before us must be dealt with in the same manner."

A decree of maintenance is but an incident to one for separation, and the circumstances under which a decree for maintenance may be made must be of such a nature as would justify a decree of separation. *Ruckman v. Ruckman*, 58 How. Pr. 278.

Where the husband has judgment for a separation, the court cannot order an allowance to the wife for support. *Waring v. Waring*, 100 N. Y. 570; *Perry v. Perry*, 2 Barb. Ch. 311; *Palmer v. Palmer*, 1 Paige, 276. And if the husband establishes his defense of misconduct

on the part of the wife, the court cannot award the custody or maintenance of the children. *Palmer v. Palmer*, 29 How. Pr. 390.

An allowance to the wife for counsel fees or expenses of the action cannot be awarded in a final judgment for divorce or separation. *Straus v. Straus*, 67 Hun, 491; 50 N. Y. St. Repr. 845; 22 N. Y. Supp. 567.

Decree for support and maintenance, without decree of separation.

The provisions of section 1766 authorizing a decree for the support and maintenance of the wife, although a decree for separation be not made, only apply where cruel and inhuman treatment or other causes of divorce have been made to appear to the court. The equity powers of the court cannot be invoked to sustain a judgment awarding the custody of children to the wife; the action being a statutory one, the powers of the court are to be sought in the statute itself, and only such judgment can be rendered as is authorized thereby. Nor is such relief justified by the provisions of § 1771 of the Code (*post*, p. 175); authorizing, in an action by a married woman for divorce or separation, an order for the custody of the children "during the pendency of the cause, or at its final hearing or afterwards;" this simply provides for the provisional custody of the children, and for awarding their custody when a decree shall be granted. *Davis v. Davis*, 75 N. Y. 221.

The circumstances, under which a decree for maintenance may be made, must be of such a nature as would, in themselves, justify a direction of separation. The husband's intemperance is not a cause of separation, and a decree will not issue for the maintenance of a wife because of such intemperance. *Douglas v. Douglas*, 5 Hun, 140. As to modification of judgment, see *post*, p. 175.

If after a decree of separation the parties become reconciled, the court may revoke the decree, subject to such regulations as it sees fit to impose.

Code Civ. Proc. § 1767. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time, by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

The original note to the section of the Revised Statutes whence this section is derived, made by the revisers is: "New, but conformable to the practice of the court of chancery. *Barrere v. Barrere*, 4 Johns. Ch. 187." In the case cited Chancellor Kent assumed that he had the power to grant a decree of separation until the parties might become reconciled, but said: "Such a decree seems to be of too loose a texture, and to be destitute of the requisite sanction. It separates the parties until they are reconciled, and leaves that event open to dispute. I prefer that the sentence shall be binding and effectual until the parties shall have applied to the court, and received, upon just grounds, a judicial recognition of the certainty and sincerity of their reconciliation." It would seem then that before the adoption of section 56 of the Revised Statutes above referred to, from which this section was derived, a judgment for separation could not be revoked by a reconciliation of the parties, without an application to the court granting the decree of separation.

The case of *Barrere v. Barrere*, above cited, is considered in the case of *Jones v. Jones*, 90 Hun, 414; 70 N. Y. St. Repr. 319; 35 N. Y. Supp. 877, where the court held that the only method by which a judgment for a separation forever, or for a limited period, can be revoked is that prescribed by the above section of the Code, and it can only be done by the court. The fact that after a decree of separation was

granted the parties lived together as husband and wife, does not operate to revoke the decree.

If a wife voluntarily return to her husband before the trial of an action for separation the same is terminated, although no order of discontinuance is entered. The attorney for the wife may bring an action against the husband for the value of his services if any counsel fees or alimony has been awarded. *Naumer v. Gray*, 41 App. Div. 361, 58 N. Y. Supp. 476.

In *Hobby v. Hobby*, 5 App. Div. 496; 39 N. Y. Supp. 36, an action was brought by a wife to obtain a decree of separation from her husband, and the defendant answered that a similar action was brought by the plaintiff in 1868 in which a judgment of separation was recovered. The plaintiff admitted this, but in order to avoid its effect, alleged that the parties were reconciled and lived together from 1875 to 1880, when the defendant again abandoned her. It was held that the action could not be maintained and that the decree entered in 1868 was not vacated or in any manner revoked by the reconciliation or cohabitation of the parties. The only way in which such a decree can be revoked is in the manner prescribed by section 1767 of the Code Civil Procedure.

CHAPTER VII.

PRACTICE IN MATRIMONIAL ACTIONS.

Service of summons; endorsement thereon stating nature of action; proof of service.

Code Civ. Proc. § 1774. Regulations respecting judgment.

In an action brought as prescribed in this title, a final judgment shall not be rendered in favor of the plaintiff, upon the defendant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally served upon the defendant; or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for that purpose, obtained as prescribed in chapter fifth of this act, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: "Action to annul a marriage;" "action for a divorce;" or "action for a separation;" according to the article of this title, under which the action is brought. Where the summons is personally served, but a copy of the complaint is not served therewith; or where a copy of the summons and a copy of the complaint are delivered to the defendant without the state, the certificate or affidavit proving service, must affirmatively state, in the body thereof, that such an inscription, setting forth a copy thereof, was so written or printed upon the face of the copy of the summons delivered to the defendant.

General Rule 18. Proof of service of summons by persons other than sheriff: in divorce cases.

Where personal service of the summons and of the com-

plaint, or notice, if any accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service his age, or that he is more than twenty-one years of age; when and at what particular place, and in what manner he served the same; and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state in his affidavit that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age.

In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the above requirements, shall state what knowledge the affiant had of the person served being the defendant and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto, and when service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge.

A divorce will not be granted unless there is clear proof that the person upon whom the summons was served was in fact the defendant. Affidavits of the plaintiff as to such service should be received with great caution, if admissible at all. *Delling v. Delling*, 34 Misc. Rep. 122; 69 N. Y. Supp. 479.

Where the brother of the plaintiff served a summons in an action for divorce upon the defendant wife, he should be called and examined as to his knowledge that the person served was the defendant in case of default, even though he states in the affidavit of service that he knew her very well. *Fawcett v. Fawcett*, 29 Misc. Rep. 673; 61 N. Y. Supp. 108.

In *Pessolano v. Pessolano*, 34 Misc. Rep. 16; 69 N. Y. Supp. 449; a decree of divorce was refused in an uncontested action where the wife was attempted to be identified by a photograph of herself and her alleged paramour, while it was not shown by independent proof that the man represented in the photograph might not have been her husband, and it was not shown that the person served with the summons and complaint was in fact the defendant.

As matrimonial actions are in rem, jurisdiction of a non-resident defendant may be obtained on service by publication; but no decree for alimony can be entered on such service unless the defendant appears, or jurisdiction has been obtained by attachment.

Voluntary appearance of the defendant gives the court jurisdiction.

Code Civ. Proc. § 438. Cases in which service of summons by publication, etc., may be ordered.

*An order directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases: * * * **

4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

Although jurisdiction of a non-resident defendant in an action for divorce may be obtained by publication as the action is *in rem*, no judgment for alimony and costs can be entered against him unless he appeared or jurisdiction has been obtained by attachment. *Burch v. Burch*, 116 App. Div. 865; 102 N. Y. Supp. 305.

The Supreme Court of New York has jurisdiction of an action to annul a marriage contracted within this State, though both parties are non-residents. The court may acquire jurisdiction of such non-resident defendant by service by publication. *Becker v. Becker*, 58 App. Div. 374; 69 N. Y. Supp. 75.

A voluntary appearance in an action for divorce is equivalent to personal service of the summons. *Freeman v. Freeman*, 126 App. Div. 601; 110 N. Y. Supp. 686.

It is questionable whether sections 435 and 436 of the Code of Civil Procedure providing for the substituted service of summons, where the defendant cannot be found apply to an action for divorce, but if so, they should be applied with the utmost caution. It must appear that service by publication cannot be made. *Maiello v. Maiello*, 42 Misc. Rep. 266; 86 N. Y. Supp. 543.

Arrest of defendant. Injunction.

A defendant cannot be arrested in an action for divorce upon an affidavit alone, where the complaint has not been filed. *Lichstrahl v. Lichstrahl*, 38 Misc. Rep. 331; 77 N. Y. Supp. 900.

A husband who obtained a foreign divorce for abandonment, valid because the wife appeared in the action, cannot be arrested in a subsequent action by the wife brought in this state as the matrimonial relation was ended. *Strauss v. Strauss*, 122 App. Div. 729; 107 N. Y. Supp. 842.

A wife suing for separation is not entitled to an injunction restraining her husband from living and cohabiting with another woman. *Ellis v. Ellis*, 55 Misc. Rep. 34; 106 N. Y. Supp. 217.

A married woman may acquire a domicile different from that of her husband for the purpose of bringing an action for divorce or separation.

Code Civ. Proc. § 1768. Married woman deemed a resident in certain cases.

If a married woman dwells within the State, where she commences an action against her husband; as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere.

So too she may serve a non-resident husband by publication in an action for annulment. *Becker v. Becker*, 58 App. Div. 374; 69 N. Y. Supp. 75.

How the next friend of an infant, idiot or lunatic may obtain leave to bring an action for annulment.

Code Civ. Proc. § 1755. How next friend of infant, lunatic, etc., allowed to sue, etc.

An order, allowing a person to maintain an action, as the next friend of an infant, as prescribed in section 1744 of this act, or as the next friend of an idiot or lunatic, as prescribed in section 1748 of this act, may be granted by the court, in its discretion, without notice, or upon notice to such persons and in such a manner, as it deems proper. A motion to vacate such an order must be made at a term held by the judge who granted it, unless he is dead, out of office, or unable to hear it by reason of sickness or otherwise; or unless he expressly directs it to be heard at a term held by another judge. But where such an order has been granted, the court, to which application for final judgment is made, may dismiss the complaint, if justice so requires, although, in a like case, the party to the marriage, if plaintiff, would be entitled to judgment.

COMPLAINT.

The complaint in matrimonial actions must set forth the offenses charged as definitely as possible in order that the defendant may be prepared to meet the charge.

A bill of particulars may be ordered.

In cases of default certain defenses must be negatived in the complaint, or by affidavit, as required by the court rules.

And if the legitimacy of children be questioned the issue must be raised by the pleading.

In an action for a divorce on the ground of adultery, the complaint must allege the places at which the adultery was

committed. This allegation must be definite and certain. A complaint which alleges that the defendant, from a certain date up to the time of the verification of the complaint, went to, visited, and at various houses or places of prostitution or assignation in the city of New York (which times and places the plaintiff cannot particularize), committed adultery, and had carnal connection with a person therein named, is too broad and general and must be rendered definite and certain as to the places or be stricken from the complaint. *Cardwell v. Cardwell*, 12 Hun, 92.

In *Wood v. Wood*, 2 Paige, 108, Chancellor Walworth says: "The only safe and prudent course is to require the charge, whether of crimination or recrimination, to be stated in the pleading and in the issues in such a manner that the adverse party may be prepared to meet it on the trial. If the persons with whom the adultery was committed are known, they must be named in the pleading, and the adultery must be charged with reasonable certainty as to the time and place. If they are unknown, that fact should be stated in the pleading and the time, place and circumstances under which the adultery was committed should be set forth. Neither party has a right to make such a charge against the other on mere suspicion relying upon being able to fish up testimony before the trial to support the allegation. When information sufficient to justify the charge is given, the party will be possessed of the requisite facts to put the charge in a distinct and tangible form on the record."

Where a pleading alleges that the parties with whom the adultery was committed are unknown, and does not state the times or places of such adultery, it has been held that the pleader was warranted in not giving the names of the persons with whom the adultery was committed because they were unknown, but he is not warranted in omitting to state the times or places at which the offenses were committed. *Tim v. Tim*, 47 How. Pr. 253.

In *Codd v. Codd*, 2 Johns. Ch. 224, one of the earlier cases in chancery in this state, where the bill charged the defendant with adultery in this state and elsewhere, without stating with whom or that the name of the person was unknown, and without making any statement that the charge could not be more specific, or why it was so vague and general, it was held that the adultery was not sufficiently specified to entitle the complainant to an award of a feigned issue to try it.

In the case of *Germond v. Germond*, 6 Johns. Ch. 347, the chancellor concedes and holds that it is not necessary to name the person with whom the defendant has committed the adultery where his name is unknown and no objection is made or suggested that the issues are improper or too broad in charging the commission of the offense to have been in the county of Rensselaer, or in the city of New York, without the specification of any particular place therein.

In the case of *Mitchell v. Mitchell*, 61 N. Y. 398, the cases above referred to, and in addition the cases of *Bokel v. Bokel*, 3 Edw. Ch. 376; *Heyde v. Heyde*, 3 Sandf. Ch. 692; *Strong v. Strong*, 3 Robt. 719; *Pramagiori v. Pramagiori*, 7 Robt. 302, are discussed at length, and the rule is stated to be, where the complaint, in an action for divorce on the ground of adultery, alleges the commission of the offense with a person whose name is unknown to the plaintiff, at a time between certain specified dates, and in a town or city named, with the further allegation that the plaintiff is unable to state more particularly the times and places, it is sufficient to authorize evidence in proof of the offense so charged, and, if it be proved, to sustain the action, although no proof be given of the offenses particularly charged.

An action for absolute divorce and an action for separation cannot be united in the same complaint. This, notwithstanding that section 1770 of the Code of Civil Procedure allows a counterclaim for divorce or separation to be introduced in an action for divorce or separation. *Conrad v. Conrad*, 124 App. Div. 780; 109 N. Y. Supp. 387.

Complaint for separation.

Code Civ. Proc. § 1764. Requisites of complaint.

The complaint in such an action must specify particularly the nature and circumstances of the defendant's misconduct, and must set forth the time and place of each act complained of, with reasonable certainty.

Allegations of scandalous, indecent and licentious acts, unaccompanied by allegations that they gave her pain or

led her to fear personal injury, are immaterial in an action for limited divorce because of cruelty. *Klein v. Klein*, 42 How. Pr. 166; 34 N. Y. Super Ct. 481; 11 Abb. N. S. 450.

For a complaint stating a cause of action for separation in that the husband compelled his wife to live with his parents and failed to provide for her, etc. See *Mossa v. Mossa*, 123 App. Div. 400, 107 N. Y. Supp. 1044.

Court rules.

General Rule 72 (in part).

When the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and, also, where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

The provision of rule 72 that a plaintiff suing for divorce where the defendant was living in adulterous intercourse must allege in the complaint that five years have not elapsed since such intercourse was discovered by the plaintiff, applies only in cases of default. *Ackerman v. Ackerman*, 123 App. Div. 750; 108 N. Y. Supp. 534.

The four defenses to divorce prescribed in section 1758

of the Code of Civil Procedure are not available unless pleaded and although rule 72 of the General Rules of Practice requires that in cases of default the first three defenses must be negatived by the plaintiff in the complaint or by affidavit, the fourth defense, that is to say the adultery of the plaintiff, need not be denied. *Thompson v. Thompson*, 127 App. Div. 296; 111 N. Y. Supp. 426.

See Judgment by Default, *post*, p. 166.

General Rule 75. Legitimacy of children on divorce.

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If, upon default, proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

Where a husband's complaint in an action for divorce did not question the legitimacy of the issue, the wife cannot have that question determined as to a child born a year before the marriage. It seems that where the complaint tenders no issue as to the legitimacy of the children the parties cannot by consent or otherwise extend the issues beyond the scope and purpose of the pleadings. *Tully v. Tully*, 28 Misc. Rep. 54; 59 N. Y. Supp. 818.

For the code provision on this subject and authorities, see *ante*, pp. 97, 100.

Amendment of complaint.

Where a husband brought an action for absolute divorce and the wife a counterclaim for separation on the ground of cruel and inhuman treatment, it was held that after the issue had been decided in favor of the wife the husband would not be allowed to amend his pleadings so as to charge the wife with adultery with another person,

when it appeared that he possessed information tending to show the charge when the action was commenced. However, the husband should be allowed to take testimony as to such misconduct with the person referred to in the proposed amendment, because such evidence was admissible under the pleadings as originally framed, being in justification of the cruel and inhuman treatment alleged by the wife. *Israel v. Israel*, 54 App. Div. 408; 66 N. Y. Supp. 777.

In an action by a wife against her husband for a limited divorce, an amendment to the complaint was allowed, by which the action was changed to a suit for an absolute divorce. The order allowing the amendment was made more than seven years after the commencement of the action, and without personal notice to the defendant, although the papers upon which the application was made showed that the plaintiff knew where the defendant might be found. It was held that the amendment was improperly allowed. *Robertson v. Robertson*, 9 Daly, 44.

In the case of *Cardwell v. Cardwell*, 12 Hun, 92, an order was granted requiring the plaintiff to amend his complaint by stating the time and place where the misconduct is supposed to have taken place.

Supplemental complaint.

In an action for divorce the plaintiff cannot serve a supplemental complaint setting up acts of adultery committed after the action was commenced, even though the defendant has interposed a counterclaim setting up acts of adultery committed by the plaintiff. It seems that the plaintiff by a supplemental complaint can only set up facts bearing on the original cause of action as it existed when the cause of action was commenced, or facts occurring after the action was commenced which will affect the relief to which the plaintiff would be entitled. *Faas v. Faas*, 57 App. Div. 611; 68 N. Y. Supp. 509.

Acts of cruel and inhuman treatment occurring after the commencement of an action for separation upon that ground may be set forth in a supplemental complaint as they do not necessarily constitute a new cause of action.

The rule is otherwise in an action for divorce where adulteries subsequent to the commencement of the action cannot be set up in the supplemental pleading. *Smith v. Smith*, 99 App. Div. 283; 90 N. Y. Supp. 927.

The plaintiff will not be allowed to serve a supplemental complaint alleging adulteries committed by the defendant since the beginning of the action. This rule was laid down in the case of *Milner v. Milner*, 3 Edw. Ch. 114, and followed in *Morange v. Morange*, 2 N. Y. Law Bull. 30; *Day v. Day*, 4 Misc. Rep. 235; 24 N. Y. Supp. 873; *Halsted v. Halsted*, 26 N. Y. Supp. 758. In the latter case, Judge Giegerich says: "While

a complete determination of the rights of the parties is desirable, I fail to see how the application can be granted without disregarding the rule, as laid down by the adjudications, that a new substantive cause of action, upon which a judgment can be had without connecting it with the original complaint, cannot be set up by supplemental complaint." It was contended in this case that a different rule was laid down in *Blanc v. Blanc*, 67 Hun, 384; 51 N. Y. St. Repr. 822; 22 N. Y. Supp. 264. But a distinction exists between the latter case and the cases above cited. In the latter case the defendant was permitted to serve a supplemental answer, pleading, by way of counterclaim, acts of adultery committed by the plaintiff after the suit was brought. The reason for the application of a different rule in the latter case is that the defendant cannot discontinue and sue over again, while the plaintiff can.

Bill of particulars.

A defendant charged with adultery is entitled to a bill of particulars, showing with precision the time, place and circumstances of each offense alleged. *Hunter v. Hunter*, 38 Misc. Rep. 672; 78 N. Y. Supp. 243.

But the defendant is not necessarily, and as a matter of course, entitled to a bill of particulars. *Mitchell v. Mitchell*, 61 N. Y. 398.

To entitle his application for the bill to success, his probable inability to meet the allegations as set forth in the complaint should be shown, for, notwithstanding the very general nature of the allegation, he may be fully aware of the individual intended to be referred to in making it; and if he has that knowledge or information, then he cannot be misled or prejudiced in his defense by the omission to state the name, or give the description of the person in the complaint, or to designate the place where the misconduct may have occurred. The affidavit showing the defendant's inability to meet the allegations must be made by the defendant himself. It will not be sufficient if made by his attorney. *De Carrillo v. De Carrillo*, 53 Hun, 359; 25 N. Y. St. Repr. 423; 6 N. Y. Supp. 305.

Where a defendant sued for divorce recriminates without asking affirmative relief, he will nevertheless be required to give a bill of particulars showing the time and place where the adultery of the plaintiff was committed. *Weis v. Weis*, 123 App. Div. 409; 107 N. Y. Supp. 1062.

See *Carrie v. Davis*, 41 App. Div. 520; 58 N. Y. Supp. 820, for a case where a bill of particulars was denied in an action to annul a marriage because of the fraud of the wife in contracting such marriage knowing she had another husband living.

In an action brought to obtain a divorce by an alleged wife the de-

fendant is entitled to know and to ascertain, through the medium of a bill of particulars, the time when and the place where the alleged marriage took place (if a ceremonial marriage is claimed), by whom it was celebrated, and if a marriage is claimed to have taken place without any witnesses present the time when and the place where such contract was entered into. *Bullock v. Bullock*, 85 Hun, 373; 66 N. Y. St. Repr. 493; 32 N. Y. Supp. 1009.

Where the answer makes a countercharge of adultery, alleging a specific and certain act, and alleging also that "at various other times in the years 1897 and 1898, the plaintiff committed adultery," with the co-respondent "at certain other places in said city and borough, to the plaintiff unknown," it was held that a motion for a bill of particulars should be denied. The defendant showed by affidavit that he expected to prove but one specific instance of adultery, though intending to prove intimacy and conduct on the part of the parties; held, that the bill of particulars should not be ordered in such a form as to exclude evidence of general course of conduct. *Ketcham v. Ketcham*, 32 App. Div. 26; 52 N. Y. Supp. 961.

ANSWER.

The answer in an action for divorce need not be verified, although the complaint be verified.

The defenses to the several matrimonial actions are treated as matters of substantive law. See *Annulment, Divorce, Separation*.

Code Civ. Proc. § 1757. Subd. 1 (in part). Answer.

The answer of the defendant may be made, without verifying it, notwithstanding the verification of the complaint.

General Rule 74. Divorce, answer in action.

The defendant in the answer may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

Code Civ. Proc. § 1765. Answer in action for separation.

The defendant may set up in justification the misconduct

of the plaintiff; and if that defense is established to the satisfaction of the court, the defendant is entitled to judgment.

The rule that a party is bound by admissions in his pleadings applies in divorce actions as well as in other actions. *Doeme v. Doeme*, 96 App. Div. 284; 89 N. Y. Supp. 215.

If adultery is set up in the answer, it should be alleged in the same manner as when contained in a complaint. *Morell v. Morell*, 3 Barb. 236.

The adultery of the plaintiff, to constitute a defense, must be alleged in the answer; when so alleged it is a ground for affirmative relief in the same action. *Anon.*, 17 Abb. Pr. 48.

The answer setting up the plaintiff's adultery need not allege the inhabitancy of the parties, or either of them, at the time of the offense. *Leseuer v. Leseuer*, 31 Barb. 330.

A denial in the answer of an allegation in the complaint that the plaintiff was, at the time of exhibiting her complaint, an actual resident of this state, does not, of itself, take from the court the power of awarding temporary alimony and expenses. *Brinkley v. Brinkley*, 50 N. Y. 184.

An allegation in the answer that defendant has no knowledge or information sufficient to form a belief as to whether the first wife was living at the commencement of the action, is a denial of a material allegation. *Anon.* 15 Abb. Pr. N. S. 311.

An answer, which seeks to avoid the alleged marriage as invalid by reason of a prior marriage of the defendant, must allege that fact, as it is not provable under a denial of the allegation of the marriage. *Vincent v. Vincent*, 16 Daly, 534; 17 N. Y. Supp. 497.

If the answer alleges various acts of adultery by the plaintiff, at various times and places, the plaintiff may make a motion for a bill of particulars. *Kelly v. Kelly*, 12 Misc. Rep. 457; 68 N. Y. St. Repr. 133; 34 N. Y. Supp. 255.

Answer to complaint for separation.

The defendant is not entitled to show misconduct on the part of the plaintiff, unless the fact is affirmatively alleged in the answer; a denial

of an allegation in the complaint as to the plaintiff's good conduct is not sufficient. *Roe v. Roe*, 14 Hun, 612.

An answer in an action for separation denying knowledge or information sufficient to form a belief as to a marriage alleged by the plaintiff will not be stricken out as frivolous if it appear that the defendant had no knowledge of the marriage and if contracted he was either drugged or so intoxicated as to be unable to understand that he assumed the marital relation. *Allen v. Allen*, 125 App. Div. 838; 110 N. Y. Supp. 303.

When the action is for divorce or separation the defendant may make a counterclaim for either divorce or separation and seek affirmative relief.

But he cannot interpose an action for annulment as a counterclaim to a suit for divorce or separation.

Code Civ. Proc. § 1770. What is deemed a counterclaim.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, a cause of action against the plaintiff, and in favor of the defendant, arising under either of said articles, may be interposed, in connection with a denial of the material allegations of the complaint, as a counterclaim.

The effect of this section is to authorize the defendant, in an action for a separation or absolute divorce, to interpose a cause of action against the plaintiff as a counterclaim, and if established in connection with the failure on the part of the plaintiff to prove his or her case, to have a judgment in his or her favor.

In an action for separation on the ground of cruel and inhuman treatment, the defendant is at liberty to allege in his answer adulteries by way of counterclaims and seek affirmative relief against the plaintiff for a dissolution of his marriage with her. *De Meli v. De Meli*, 120 N. Y. 485; *Van Benthuyzen v. Van Benthuyzen*, 17 N. Y. St. Repr. 978; 15 Civ. Pro. Rep. 234; *Fullmer v. Fullmer*, 6 Week. Dig. 22.

An action to annul a marriage cannot be set up as a counterclaim to an action for divorce or separation, because section 1770 of the Code of Civil Procedure does not give such right. *Taylor v. Taylor*, 25 Misc. Rep. 566; 55 N. Y. Supp. 1052; *affd.*, 68 App. Div. 638; 74 N. Y. Supp. 1148.

A husband sued for separation cannot set up as a counterclaim that the marriage was procured by fraud and duress of the wife. He may, however, set up such matters as a defense. *Durham v. Durham*, 99 App. Div. 450; 91 N. Y. Supp. 295.

A defendant sued for divorce, as a counter-claim, may set forth an action for a separation on the ground of cruel and inhuman treatment. Such matter will not be struck out as irrelevant although it is not in express terms defined as a counterclaim if such be its intention. *Mason v. Mason*, 46 Misc. Rep. 361; 94 N. Y. Supp. 868.

Recriminating charges of adultery require the same evidence to establish them as original charges. *Pollock v. Pollock*, 71 N. Y. 137.

A supplemental answer setting up acts of adultery committed by the plaintiff subsequent to the commencement of the action may be permitted by the court. *Blanc v. Blanc*, 67 Hun, 384; 51 N. Y. St. Repr. 322; 22 N. Y. Supp. 264.

A counterclaim of adultery is not demurrable for not stating that such adultery was without the connivance, privity, or procurement of the defendant. *Van Benthuyzen v. Benthuyzen*, 17 N. Y. St. Repr. 878; 15 Civ. Proc. Rep. 234.

Where a wife sued for divorce makes a counterclaim for separation upon the ground of abandonment, which the husband admits, and the jury finds that the wife was not guilty, she is entitled to a separation. *Israel v. Israel*, 38 Misc. Rep. 335; 77 N. Y. Supp. 912.

RIGHTS OF CO-RESPONDENTS.

The co-respondent in an action for divorce may be served with the pleadings, and thereupon may appear and defend so far as the issue may affect him.

If not served he may, nevertheless, appear and defend at any time before final judgment.

If the adultery, denied by him, is not proved he is entitled to a bill of costs.

Code Civ. Proc. § 1757 (in part).

2. *In an action brought to obtain a divorce on the ground of adultery, the plaintiff or defendant may serve a copy of his pleading on the co-respondent named therein. At any time within twenty days after such service on said co-respondent, he may appear to defend such action, so far as the issues affect such co-respondent. If no such service be made, then at any time before the entry of judgment any co-respondent named in any of the pleadings shall have the right, at any time before the entry of judgment, to appear either in person or by attorney, in said action and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter, and he may appear to defend such action, so far as the issues affect such co-respondent. In case no one of the allegations of adultery controverted by such co-respondent shall be proved, such co-respondent shall be entitled to a bill of costs against the person naming him as such co-respondent, which bill of costs shall consist only of the sum now allowed by law as a trial fee, and disbursements, and such co-respondent shall be entitled to have an execution issue for the collection of the same.*

The appearance of a co-respondent in a divorce actions does not invalidate proceedings prior to the appearance, and he is not entitled to a new trial of issues already disposed of. *It seems*, that the court may order a new trial on the intervention of such corespondent if necessary to give him a hearing for his protection but it will not do so where the corespondent before appearing had knowledge of the action and was a witness at the trial. *Boller v. Boller*, 111 App. Div. 240; 97 N. Y. Supp. 609.

The intention of subdivision 2 of section 1757 of the Code is to give a co-respondent in an action for absolute

divorce the rights of a party. Thus, where a husband sues for divorce, and the defendant denies the adultery, setting up a counterclaim charging adultery with an unmarried woman, and the husband does not reply, the co-respondent is entitled to intervene, answer and demand a trial by jury of the issues so far as they affect her. *Rixa v. Rixa*, 35 Misc. Rep. 227; 71 N. Y. Supp. 815.

Speaking of the rights of a co-respondent the court says: "Thus as an incident of the right to defend the co-respondent would have the right to move for a bill of particulars of the charges; * * * I am of opinion that the co-respondent would have the right to receive copies of all papers affecting her rights in the action, as for example, notice of trial, for how otherwise could she be informed of the time of trial, and her default could not otherwise be taken. *Rixa v. Rixa*, 35 Misc. Rep. 227; 71 N. Y. Supp. 815.

TRIAL.

Examination before trial; preference; failure to pay alimony pendente lite.

In an action by a wife to annul her marriage on the ground of her husband's impotency, the court may compel him to submit to a physical examination. The procedure to be followed is within the discretion of the court. *Gore v. Gore*, 103 App. Div. 168; 93 N. Y. Supp. 396.

Where a wife sues for the annulment of marriage upon the ground of fraud, which consisted in the husband's having represented himself to be in good health, when in fact he was affected with a physical disease, the court may, by its inherent power, compel a physical examination. But this extreme remedy will not be granted before trial, nor upon the trial, unless necessary to prevent failure of justice. The application for examination before trial does not rest upon

statute, nor on the Code of Civil Procedure, section 872, nor need it comply with that section. *Anonymous*, 34 Misc. Rep. 109; 69 N. Y. Supp. 547.

Where a wife married for two years produces evidences that she is still *virgo intacta*, and sues to annul marriage upon the ground of incapacity of her husband, the court by virtue of its equitable powers may direct a surgical examination to be made by a competent surgeon before a referee. *Cahn v. Cahn*, 21 Misc. Rep. 506; 48 N. Y. Supp. 173.

Where a husband sued for a separation makes a counter-charge of adultery and asks for an absolute divorce, the plaintiff will not be allowed to examine the defendant before trial solely to obtain evidence to establish the amount of permanent alimony. *Haff v. Haff*, 132 App. Div. 338; 116 N. Y. Supp. 1100.

An oral examination of witnesses upon a commission to be executed without the state to obtain evidence of adultery in an action for divorce, will be denied where it is not shown that the witnesses are adverse to the plaintiff but are merely adverse to testifying upon that subject, and no efforts have been made to obtain information from them. *Depue v. Depue*, 115 App. Div. 466; 101 N. Y. Supp. 412.

Preference; failure to pay alimony.

Code Civ. Proc. § 791.

Civil causes are entitled to preference among themselves, in the trial or hearing thereof, in the following order, next after the causes specified in the last section but one:

* * * * *

13. *An action for absolute divorce in which an order has been made granting temporary alimony.*

Where an issue of law and an issue of fact, or two or more other questions of different natures, come before the same term of the court for trial or hearing, the preference given by this section affects only the order in which the issues or questions of the same nature are to be disposed of.

A husband who has failed to pay temporary alimony and counsel fees in an action for divorce, cannot move for a preference under subdivision 13 of section 791 of the Code of Civil Procedure. *Fennessy v. Fennessy*, 111 App. Div. 181; 97 N. Y. Supp. 602.

A wife may delay preparing for trial until her husband pays counsel fees as ordered by the court, and if he fails to do so until the day set for trial, the court will grant an adjournment. *Church v. Church*, 81 App. Div. 349; 80 N. Y. Supp. 770.

RIGHT TO TRIAL BY JURY.

In an action for divorce there is an absolute right to a jury trial on the issue of adultery. But there is no such right as to the other issues in the action, save as the court rule requires an issue as to the legitimacy of children to be submitted to the jury if the issue of adultery be submitted.

So too in an action for annulment there is a right to a jury trial on all the issues, save that of physical incapacity.

There is no right to a jury in an action for separation.

The practice in matrimonial actions is equitable in character (having like equity Roman sources), except in respect to the right to a jury trial on the issue of adultery.

Issues must be framed for the jury as in equitable actions; but the right to such trial cannot be questioned.

Code Civ. Proc. § 1757, subd. 1 (in part).

If the answer puts in issue the allegation of adultery, the court must upon the application of either party, or it may, of its own motion, make an order directing the trial, by a jury, of that issue; for which purpose the question to be tried must be prepared and settled, as prescribed in section 970 of this act.

General Rule 75. Legitimacy of children on divorce.

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes

them to be illegitimate, shall be distinctly made in the complaint. If, upon default, proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

Code Civ. Proc. § 1753 (in part).

In such an action, [for annulment] except where it was founded upon an allegation of the physical incapacity of one of the parties thereto, the court must, upon the application of either of the parties, make an order directing the trial, by a jury, of all the issues of fact; or it may, of its own motion, make an order directing the trial by a jury, of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled, as prescribed in section 970 of this act.

Code Civ. Proc. § 970. Order for trial by jury, of specific questions of fact, when of right.

Where a party is entitled by the constitution, or by express provision of law, to a trial by jury, of one or more issues of fact, in an action not specified in section nine hundred and sixty-eight of this act, he may apply, upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated, is conclusive in the action unless the verdict is set aside, or a new trial is granted.

A suit for absolute divorce is in equity, with a statutory

right to a jury trial of the issue of adultery. *Tietzel v. Tietzel*, 122 App. Div. 873; 107 N. Y. Supp. 878.

Where the issue of adultery is sent to the jury upon the application of either party under section 1757 of the Code, the finding of the jury thereon is conclusive, by reason of section 970, unless the verdict is set aside or a new trial granted. *Lowenthal v. Lowenthal*, 157 N. Y. 236.

Where, in an action for divorce, no affirmative defense is set up, and the defendant demands a jury trial, and the sole issue presented is that of adultery, which is found by the jury, it is proper for the court to order judgment for the relief demanded in the complaint without making findings or conclusions or filing a decision under section 1022 of the Code. *Lowenthal v. Lowenthal*, 157 N. Y. 236.

Where an answer in divorce is merely a general denial, and sets up no affirmative defense, so that no issue of connivance is raised and questions are framed for trial by jury, including the question as to connivance, but no proof thereof is offered, and the jury finds affirmatively as to the adultery, the court may set aside and disregard an answer of the jury stating, by mistake, that there was connivance upon part of the plaintiff. *Lowenthal v. Lowenthal*, 157 N. Y. 236.

Though the judge presiding at a trial brought by the husband for absolute divorce has power to set aside the verdict exonerating him from the charge of adultery, yet such power should not be exercised except where it is demonstrated that the verdict is the result of sympathy or other improper influence, or has been reached in disregard of clear and convincing proof by uncontradicted testimony of disinterested witnesses. *Donnelly v. Donnelly*, 50 App. Div. 453; 64 N. Y. Supp. 83.

The issues as to adultery raised in an action for divorce must be tried before a jury, unless a jury trial is waived. *Batzel v. Batzel*, 42 N. Y. Super. Ct. 561.

The right to a trial by jury in such cases is a constitutional one, and cannot be reduced to a discretionary right by the general rules of practice. *Conderman v. Conderman*, 44 Hun, 181; 7 N. Y. St. Repr. 789; *Sigel v. Sigel*, 28 Abb. N. C. 308; *Whitney v. Whitney*, 76 Hun, 585; 58 N. Y. St. Repr. 272; 28 N. Y. Supp. 214.

In an action for divorce on the ground of adultery, the issues as to adultery must be settled before notice of trial can be given or the cause placed on the calendar. *Leslie v. Leslie*, 11 Abb. N. S. 311.

In framing issues for a jury trial in an action for divorce the court should not submit the issue of adultery at divers places in the city of New York "and elsewhere" as such issue is too general and indefinite. The defendant is entitled to have the issues framed with such definiteness that he may prepare his defense without surprise upon the trial. *Bush v. Bush*, 103 App. Div. 588; 93 N. Y. Supp. 159.

Where an interlocutory judgment of divorce has been vacated and the defendant let in to defend, and six months after the entry of an interlocutory judgment for the plaintiff, it is vacated on motion of defendant in a new trial on the grounds of collusion, a motion by the defendant to frame issues for the jury upon a new trial will be denied as the right to a jury trial is waived. *Fischer v. Fischer*, 64 Misc. Rep. 121; 117 N. Y. Supp. 1103.

Where the issues are settled in an action for divorce, and the jury disagree except as to one of the charges, in regard to which charge they were directed to find for the defendant, there is a mistrial and no judgment can be entered. *Smith v. Smith*, 27 Misc. Rep. 252; 57 N. Y. Supp. 774.

Where a part of the specific adulteries alleged are denied, the court, upon the application of either party, must direct trial by jury and a settlement of the issues raised by the denial, and the court may take evidence of the adulteries not denied. *Galusha v. Galusha*, 43 Hun, 181; 4 N. Y. St. Repr. 399.

Where the issues are stated in pursuance of a stipulation of the attorneys for the parties, they respectively waive the right to have preliminary to the trial any more questions specifically stated and settled. *Whitney v. Whitney*, 76 Hun, 585; 58 N. Y. St. Repr. 272; 28 N. Y. Supp. 214. In this case it was stated that "while the plaintiff was not, as matter of course, entitled to a bill of particulars she, at the out-

set, had the right to have the issues express the charges of misconduct on her part with a fair degree of particularity so that she might be apprised of those she was required to meet."

Issues other than adultery.

In framing issues for the jury in an action for divorce the questions as to the consent, connivance or procurement of the plaintiff and as to whether five years have elapsed since the offense was discovered and whether the plaintiff voluntarily cohabited with the defendant after said discovery, should not be submitted to the jury. Such issues should be tried by the court after a verdict of the issue of adultery. *Bush v. Bush*, 103 App. Div. 588; 93 N. Y. Supp. 159.

A jury trial is not a matter of right in an action for separation, even though the validity of the marriage be involved. *Packard v. Packard*, 88 App. Div. 339; 84 N. Y. Supp. 1090.

Where a defendant sued for divorce alleges that she was incapable of knowing the nature of acts committed by her by reason of her insanity, the issue of insanity should not be sent to a jury but should be determined by the court after the verdict on the issue of adultery. *Wilcox v. Wilcox*, 116 App. Div. 423; 101 N. Y. Supp. 828.

There is no right to a jury trial in an action for divorce where the only issue is as to the existence of the marriage. *Wood v. Platt*, 57 Misc. Rep. 140; 108 N. Y. Supp. 948.

Action for annulment.

Where an action was brought by a husband to dissolve a marriage on the ground that he was induced to enter into it by the fraudulent concealment of a disease with which his wife was afflicted, and also on the ground that by reason of such disease she was physically incapable of entering into the marriage state, and there was no reason to suppose that her physical incapacity would be removed, it was held that a compulsory reference could not be ordered unless the plain-

tiff waived his right to a trial by jury. The exception in section 1753, authorizing a reference in an action to annul a marriage because of physical incapacity of one of the parties embraces only cases in which, from a physical incapacity, other than that which results from sickness, the marriage cannot be consummated. *Morell v. Morell*, 17 Hun, 324.

Practice in framing issues.

Rule 31 of the General Rules of Practice providing that in certain instances a party desiring a jury trial shall give notice of special motion therefor, does not apply to an action for divorce as the right to a jury trial on the issue of adultery is given by section 1757 of the Code of Civil Procedure. *Wilcox v. Wilcox*, 116 App. Div. 423; 101 N. Y. Supp. 828.

The limitation of time for making the application for a trial by jury as contained in Rule 31 of the Supreme Court, cannot have the effect of qualifying the right to make the application and to have it granted in an action for divorce where the right to trial by jury exists and the framing of the issues is essential to enable the party to have a trial of the issues in that manner. *Conderman v. Conderman*, 44 Hun, 181; 7 N. Y. St. Repr. 789.

An action for divorce cannot be placed on the trial term calendar without a prior order framing the issues. *Tietzel v. Tietzel*, 122 App. Div. 873; 107 N. Y. Supp. 878; *Leslie v. Leslie*, 11 Abb. N. S. 311.

A defendant by serving a notice for the trial of a divorce action at special term does not waive his right to a jury trial for though the issues be sent to a jury the trial is at special term. *Wilcox v. Wilcox*, 116 App. Div. 423; 101 N. Y. Supp. 828.

In framing issues in an action for divorce, where the action is directed to be tried by a jury, care should be taken to add such certainty

as to the charges of misconduct on the part of the defendant as would afford him a complete opportunity to meet such charges by proof upon the trial. *De Carrillo v. De Carrillo*, 53 Hun, 359.

A jury trial on the issue of adultery should not be denied because the moving party has stipulated that the cause be placed on the special term calendar and has served notice of trial. *Tietzel v. Tietzel*, 122 App. Div. 873; 107 N. Y. Supp. 878.

Section 970 of the Code of Civil Procedure and rule 31 of the General Rules of Practice, requiring a motion to frame issues for a jury trial to be made within 10 days after issue joined, do not apply in divorce actions. A plaintiff by noticing a cause for trial at Special Term does not waive the right to a jury trial. *Haff v. Haff*, 64 Misc. Rep. 122; 118 N. Y. Supp. 52.

Where a defendant in an action for separation counterclaims for an absolute divorce, and his motion for a preference is granted, the plaintiff's request that the trial be deferred is not a waiver of her right to have the issues raised by the counterclaim framed for a jury trial. *Haff v. Haff*, 64 Misc. Rep. 122; 118 N. Y. Supp. 52.

REFERENCE.

No reference can be ordered where the defendant in an action for divorce or annulment fails to answer, and the court itself must take proof of the facts alleged.

And although a reference may, in the discretion of the court, be ordered in contested cases, a referee nominated by or agreed upon by the parties cannot be appointed, which rule holds in actions for separation.

The court is not bound by the findings of a referee, and may order a new trial; but it cannot on refusing to confirm the report make contrary findings.

General Rule 72, (in part).

In an action for divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interest requires that the examination of the witnesses should not be

public, exclude all persons from the courtroom except the parties to the action and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or some one specially interested upon order of the court.

Code Civ. Proc. § 1012.

*But a reference shall not be made, of course, upon the consent of the parties, in an action to annul the marriage, or for a divorce or a separation; * * * or an action wherein a defendant, to be affected by the result of the trial, is an infant. In a case specified in this section, where the parties consent to a reference, the court may, in its discretion, grant or refuse a reference; and, where a reference is granted, the court must designate the referee. If the referee, thus designated, refuses to serve, or if a new trial of an action tried by a referee, so designated, is granted, the court must, upon the application of either party, appoint another referee.*

General Rule 72, (in part).

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order the reference to a referee nominated by either party nor to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof.

Code Civ. Proc. § 1024. Qualifications of a referee.

A referee, appointed by the court, must be free from all just objection; and no person shall be so appointed, to whom all the parties object, except in an action to annul a marriage, or for a divorce, or a separation.

Code Civ. Proc. § 1229. In matrimonial causes, judgment can be rendered only by the court.

In an action to annul a marriage, or for a divorce or

separation, judgment cannot be taken, of course, upon a referee's report, as prescribed in the last section, or where the reference was made, as prescribed in section 1215 of this act. Where a reference is made in such an action, the testimony, and the other proceedings upon the reference, must be certified to the court, by the referee, with his report; and judgment must be rendered by the court.

A reference to try the issues in an action for divorce is not a reference to hear and determine but rather one to inform the conscience of the court, which alone is responsible for the judgment. Hence, the special term may examine the testimony taken before the referee and refuse a decree of divorce upon the ground that the evidence does not sustain the referee's conclusions. *Perkins v. Perkins*, 130 App. Div. 193; 114 N. Y. Supp. 960.

Even though the referee in an action for divorce be appointed "to hear and determine," it is the duty of the court to examine the testimony and it may refuse to confirm the report if satisfied that the divorce should not be granted. *Galloway v. Galloway*, 92 App. Div. 300; 86 N. Y. Supp. 1078.

The provision of rule 72 of the General Rules of Practice that the court shall not order a reference in an action for divorce without proof by affidavit of service of the summons and complaint, only applies where there is a default; the plaintiff is not confined to proof by affidavit to show jurisdiction, as for example where the defendant voluntarily appears. *Freeman v. Freeman*, 126 App. Div. 601; 110 N. Y. Supp. 686.

Where the court refuses to confirm the report of a referee appointed to hear and determine an action for divorce and orders another reference it should be before another referee. The court on refusing to confirm the report and sending the matter back in effect grants a new trial. *White v. White*, 138 App. Div. 272; 122 N. Y. Supp. 885.

Though the court may refuse to confirm the referee's report in an action for divorce, it cannot direct judgment contrary to such report. *Goldner v. Goldner*, 49 App. Div. 395; 63 N. Y. Supp. 431; *Gorham v. Gorham*, 40 App. Div. 564, 58 N. Y. Supp. 50. The contrary was formerly held, see *Schroeter v. Schroeter*, 23 Hun, 230; *Anonymous*, 3 Abb. N. C. 161; *Meyer v. Meyer*, 7 Week. Dig. 535; *Coe v. Coe*, 37 Barb. 232.

The report of the referee stands as the decision of the court, which will not review the finding upon the merits, but will only make such examination as may be necessary to ascertain whether the report is in support of the evidence, or whether there has been fraud or collusion or any evil practice in the case by either party. After such examination the application for the judgment will either be granted or denied, but the report will not be set aside; and where the parties have agreed to a reference, the court has no authority, in the absence of a reason sufficient in law to disregard the order of reference, and order a trial at the circuit. *Ryerson v. Ryerson*, 55 Hun, 191; 27 N. Y. St. Repr. 945; 7 N. Y. Supp. 726.

The special term has no power, after a trial before a referee, to examine the case upon the merits, or to reverse the report of the referee for errors or irregularities committed on the trial, and the only manner in which the trial before the referee can be reviewed is by an appeal to the General Term. *Huntley v. Huntley*, 73 Hun, 261, 57 N. Y. St. Repr. 287; 26 N. Y. Supp. 266. But the court may disregard erroneous findings collateral to the main issue and enter judgment.

A decree of divorce may be granted on the report of a referee although the court does not approve of the finding awarding the custody of the children to the guilty party. In such case the plaintiff will be allowed to move for a modification of the judgment in that respect.

Burritt v. Burritt, 53 Misc. Rep. 24; 102 N. Y. Supp. 475.

The Special Term may grant a divorce although the referee has received incompetent evidence. *Goldie v. Goldie*, 39 Misc. Rep. 389; 79 N. Y. Supp. 357.

Where the Special Term refuses to confirm the report of a referee in an action for divorce neither party can enter judgment but there must be a new trial before another referee. *Bauer v. Bauer*, 42 Misc. Rep. 557; 87 N. Y. Supp. 607.

The appointment of a referee in an action for divorce suggested by the parties on their consent is a mere irregularity which does not prevent the entry of a decree upon his report. *Young v. Young*, 38 Misc. Rep. 109; 77 N. Y. Supp. 94.

An order of reference made in an action brought to obtain a divorce which designates as referee a person who is agreed upon by the counsel for the respective parties is irregular, and should, upon motion, be modified by designating another referee. The spirit and intention of section 1012 of the Code of Civil Procedure is that the court, when a reference in an action brought for divorce has been already consented to, must name a referee of its own motion, and without the consent or agreement as to the person to be named by the counsel or parties. So, in an action brought to secure a divorce where the parties consent in open court to a reference, not to any person, but simply that the case should be referred, the plaintiff agreeing to it as a condition that she should not at once proceed to trial, and where thereafter, by a stipulation entered into between the parties to which the court acceded, a certain person was named as referee, it was held that the plaintiff was not entitled to have the whole order vacated because that portion of the order designating the person before whom the reference was to be tried was improperly made. *Ives v. Ives*, 80 Hun, 136; 61 N. Y. St. Repr. 657; 29 N. Y. Supp. 1053.

In the case of *Fullmer v. Fullmer*, 6 Week. Dig. 42, the referee was named by the parties, and upon the coming in of the referee's report, and the application for a judgment thereon the question was raised as to the regularity of the referee's appointment. The court held that the reference was not void for a selection of the referee contrary to the rules. This was in recognition of the fact that such a reference was in violation of the rules, and simply decided that it was too late to raise such a question after the case had been tried by the referee agreed upon.

When, in an action for divorce on the ground of adultery, the defendant alleges adultery on the part of the plaintiff and proves it, it is error on the part of the referee by whom the case is tried, to say nothing in his report in regard to the testimony on that question, and to direct judgment for the plaintiff upon findings establishing the guilt of the defendant. *Griffin v. Griffin*, 70 Hun, 73; 53 N. Y. St. Repr. 437; 23 N. Y. Supp. 1070.

Where the referee in an action for divorce finds the adultery of the defendant but finds also collusion which issue was not raised by the pleadings, the plaintiff is entitled to a divorce. *Bowe v. Bowe*, 55 Misc. Rep. 403; 103 N. Y. Supp. 608.

After the determination of the issues in divorce by a referee in favor of the plaintiff, the court may, upon a hearing of exceptions to the report, withhold judgment upon the ground of insufficient proof, and also for the reason that there was sufficient evidence of condonation, but a dismissal of the complaint is improper, and a new trial should be ordered. *Harding v. Harding*, 43 N. Y. Super. Ct. 27.

If it appears that the proceedings have been regular, free from fraud or collusion, and that the evidence is sufficient to uphold the

finding, it is the duty of the court to enter judgment upon the report. *Goodrich v. Goodrich*, 21 Week. Dig. 264.

In the case of *McCleary v. McCleary*, 30 Hun, 154, the General Term agreed with the conclusion of Judge Follett of the Special Term, that when issues are joined in an action for divorce, and by the consent of the parties, the court, in its discretion, may grant a reference which is a reference to hear and decide the issues, and is not merely a reference to take evidence and report the same with his opinion. When the issues are joined they are to be tried, not merely reported upon. The court says "that the reason of the provisions contained in section 1229 of the Code is that, in matters of divorce the public have an interest. Married parties are not permitted by any collusion between themselves to obtain a judgment of divorce. It is the right and duty of the state, acting through its courts, to see that no divorce is granted, unless there be real and not collusive ground therefor. Hence it is required that after a trial of the issues before a referee, not merely his report, but the whole testimony shall be presented to the court for its action."

In a number of other cases it has been held that the Special Term cannot set aside the report of the referee on the ground that the evidence is insufficient, and direct judgment to be entered against the party in whose favor the referee had found, unless it appear that there was fraud and collusion in securing the report. *Rice v. Rice*, 22 Week. Dig. 258; *Matthews v. Matthews*, 6 N. Y. Supp. 589; *Ross v. Ross*, 31 Hun, 140.

Where in an action for divorce a motion for a new trial was made before the referee's report was confirmed, it was held that the sufficiency of the evidence should be decided upon a motion for the confirmation of the report, rather than upon the motion for a new trial. *Reynolds v. Reynolds*, 53 N. Y. Supp. 135.

Where the decision of the referee is against the divorce, the court need not closely scrutinize the evidence, for in such case the marriage is protected and preserved. Where the issues have been filed and fairly tried before a referee to hear and determine, his decision should stand as a guide for the court in rendering judgment, unless some unjust, or inadvertent, or unwise ruling appears which tends to destroy the safeguards which the court throws around the indissolubility of the marriage tie, in such a case, and in such alone should the Special Term intervene. *Smith v. Smith*, 7 Misc. Rep. 305, 28 N. Y. Supp. 136.

EVIDENCE IN DIVORCE ACTIONS.

In actions or proceedings founded upon a charge of adultery, husband or wife cannot testify against each other, except to prove the marriage or to disprove the adultery.

Code Civ. Proc. § 831. When husband and wife not competent witnesses.

*A husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. A husband or wife shall not be compelled, or without consent of the other, if living, allowed, to disclose a confidential communication, made by one to the other, during marriage. * * **

The statute merely preserves a portion of the common law rule which made husband and wife incompetent witnesses for or against each other in actions of every kind, with a few exceptions, which general disability is now removed by statute. (Code Civ. Proc. § 828.)

At common law, husband and wife were incompetent to testify as witnesses in a suit for divorce. Such testimony was not received in the Ecclesiastical courts. This because, as parties, they were interested in the event of the suit, and because their testimony for or against each other was against public policy. 9 Am. & Eng. Enc. 848.

By an English law passed in 1869, the rule preventing a husband and wife from testifying as to adultery in matrimonial actions was abrogated, with the proviso that no witness in any proceeding can be asked or is bound to answer any question tending to show that he or she had been guilty of adultery unless in the same proceeding such witness shall have given evidence in disproof of his or her alleged adultery. 27 Enc. Brit. 478.

Speaking of the situation before the statute allowed a party to an action to be examined the same as any other witness, the court in *Rivenbrugh v. Rivenbrugh*, 47 Barb. 420, said: "Neither husband nor wife were in general admissible as witnesses for or against each other. If either were a party, the other could not be a witness. If both were parties,

neither could be a witness. The reasons for this rule, founded on public policy, are well stated by Duer, J. in *Hasbrouck v. Vandervoort*, 4 Sandf. 596."

In the *Rivenbrugh* case it was held that a wife sued for divorce was not a competent witness in her own behalf.

In *Bailey v. Bailey*, 41 Hun, 424, it was held that while a husband in an action for divorce could not testify against his wife, he could be cross-examined in her favor. Thus, after he has testified to the marriage the defendant may examine him to prove adultery on his part and also to prove the insanity of the defendant at the time of the offense.

In an action for divorce on the ground of adultery, where jurisdictional facts are put in issue, the plaintiff cannot testify as to any of such facts except to prove her marriage and disprove a charge of adultery against herself. It would be improper for her to testify that she was a resident of the state where the offense was committed by her husband, and at the time of bringing the action, when either of these facts are put in issue by the defendant's answer. *Dickinson v. Dickinson*, 63 Hun, 516; 45 N. Y. St. Repr. 323; 18 N. Y. Supp. 485.

In an action for divorce it is error to refuse to permit the defendant to deny specifically the charges of adultery. *Goldie v. Goldie*, 39 Misc. Rep. 389; 79 N. Y. Supp. 357.

In an action for absolute divorce it is error to permit the wife to testify as to her husband's income for the purpose of fixing alimony, but the error is not available to the husband for the first time upon appeal. *Valentine v. Valentine*, 87 App. Div. 156; 84 N. Y. Supp. 37.

A husband suing for divorce is incompetent to testify that his wife having left him for two years returned and gave birth to a child, in order to establish her adultery. *Taylor v. Taylor*, 123 App. Div. 220; 108 N. Y. Supp. 428.

In an action for absolute divorce a party cannot testify to the existence of a previous marriage in order to show that the subsequent marriage sought to be dissolved is void. *Finn v. Finn*, 12 Hun, 339.

A husband cannot testify to material facts tending to establish the charge of adultery alleged in his complaint to have been committed by

his wife. The rule in equity that where there is ample evidence before the court to sustain a finding, it will disregard incompetent evidence, is not to be applied to evidence which is incompetent because of section 831. *Colwell v. Colwell*, 14 App. Div. 80; 43 N. Y. Supp. 439. See also *Fanning v. Fanning*; 2 Misc. Rep. 90; 49 N. Y. St. Repr. 234; 20 N. Y. Supp. 849; *Budd v. Budd*, 55 App. Div. 113; 67 N. Y. Supp. 43.

If the defendant in his answer denies the charge of adultery and sets up counter allegations of adultery on the part of the plaintiff, the reception of testimony of the plaintiff, incompetent under the Code, as to the issues presented upon the charges in the complaint, but which is competent upon the issues presented by the counter charges in the answer, is not error. *McCarthy v. McCarthy*, 143 N. Y. 235. And see *Woodrick v. Woodrick*, 141 N. Y. 457; *DeMeli v. DeMeli*, 120 N. Y. 485.

In the case of *Dickinson v. Dickinson*, 63 Hun, 516, 45 N. Y. St. Repr. 323; 18 N. Y. Supp. 485, the allegations contained in the complaint, as to the residence of the plaintiff, were put in issue by the answer. The court held that it was improper to allow the plaintiff, by her own testimony, to prove her residence. It is improper for the plaintiff to testify as to jurisdictional facts which did not relate to the fact of the marriage, and did not tend to disprove a charge of adultery against herself.

JUDGMENT IN MATRIMONIAL ACTIONS.

DEFAULT OF DEFENDANT.

As the parties to a marriage cannot dissolve the relation by mutual consent, and as the law is alert to prevent the attainment of that end by a collusive action, no judgment of annulment, divorce or separation can be entered on the defendant's default unless the facts warranting the decree be proved.

These requirements appear in various sections of the Code of Civil Procedure, and in the Court Rules, as follows:

Code Civ. Proc. § 1753. Certain proceedings regulated in action to annul marriage.

In an action brought as prescribed in this article, a final judgment, annulling the marriage, shall not be rendered by default, for want of an appearance or pleading, or upon the trial of an issue, without proof of the facts, upon which the

allegation of nullity is founded. And the declaration or confession of either party to the marriage is not alone sufficient as proof; but other satisfactory evidence of the facts must be produced. In such an action, except where it is founded upon an allegation of the physical incapacity of one of the parties thereto, the court must, upon the application of either of the parties, make an order directing the trial, by a jury, of all the issues of fact; or it may of its own motion, make an order directing the trial, by a jury, of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled as prescribed in section 970 of this act.

General Rule 73. Annulment, judgment by default, when granted.

Before judgment by default shall be granted in an action to annul a marriage on the ground that the party was under the age of legal consent, proof must be made showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. If the action is brought to annul the marriage, on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show that there has been no voluntary cohabitation between the parties as man and wife; and if it is brought to annul a marriage on the ground that the plaintiff was a lunatic, proof must be produced showing that the lunacy still continues; or that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

Code Civ. Proc. § 1757 (in part). Default in Divorce action.

If the answer does not put in issue the allegation of adultery, or if the defendant makes default in appearing or pleading, the plaintiff before he is entitled to judgment, must nevertheless satisfactorily prove the material allegations of his complaint, and also, by his own testimony or otherwise, that there is no judgment or decree, in any court of the state of competent jurisdiction, against him in favor of the defendant for a divorce on the ground of adultery.

General Rule 72 (in part).

When the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and, also, where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

In an action for divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interest requires that the examination of the witnesses should not be public, exclude all persons from the courtroom except the parties to the action and their council and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or some one specially interested upon order of the court.

General Rule 76. Judgment declaring marriage void, or granting a divorce not to be by default; copy of pleading or testimony not to be furnished; judgment to be entered by court.

No judgment annulling a marriage contract or granting a divorce, or for a separation or limited divorce, shall be

made of course by the default of the defendant; or in the consequence of any neglect to appear at the hearing of the cause, or by consent. Every such case shall be heard after the trial of the issue, or upon the coming in of the proofs at a Special Term of the court; but where no person appears on the part of the defendant, the details of evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of any court, with whom the proceedings in an adultery cause are filed, on or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of this suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No judgment in an action for a divorce shall be entered except by the special direction of the court.

The court will not grant judgment upon the pleadings in a matrimonial action but will leave the rights of the parties, to be adjudicated upon the trial. *Durham v. Durham*, 99 App. Div. 450; 91 N. Y. Supp. 295.

The plaintiff, before he is entitled to judgment, in case the defendant defaults, must prove in court the material allegations of his complaint, and must show that there is no judgment or decree in a court of competent jurisdiction in this state against him in favor of the defendant for a divorce upon the ground of adultery.

Proof must be made not only of the fact of adultery, but of all the other material facts alleged in the complaint. *Arborgast v. Arborgast*, 8 How. Pr. 297.

Under Rule 72 of the Supreme Court, it must be alleged in the complaint, or shown by the plaintiff's affidavit, that the adultery charged in the complaint was committed without the consent, connivance, privity, or procurement of the plain-

tiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; proof of all these allegations must be made before the plaintiff will be entitled to a judgment of divorce. *Myers v. Myers*, 41 Barb. 114.

In relation to the proof of the facts enumerated under Rule 72, where there has been a default, the practice is thus stated by Gaynor, J., in *Evans v. Evans*, 27 Misc. Rep. 10; 57 N. Y. Supp. 274: "The time of the court is so much wasted on hearing of these defaults in actions for absolute divorce, by the unnecessary introduction of evidence on certain points, that something needs to be said about the practice." After citing the provisions of Rule 72 the court continues: "Thus, under the rule, if these things be not alleged in a verified complaint, the way to do is to present an affidavit of them. In some way it has come about that attorneys persist in introducing oral testimony of them; and that even though the verified complaint alleges them. Some attorneys even insist on asking the formal question whether five years have elapsed since the plaintiff discovered the adultery, when the allegation and the proof are that it was committed on a named date within the five years, or even within a few weeks or months. There seems to be a general notion that the things mentioned in Rule 72 are for the plaintiff to allege and prove as part of the cause of action, whereas they are no part of the cause of action, but defenses to be pleaded by the defendant. Rule 72 was made for cases of default only; and it is in effect that in anticipation of a default the plaintiff may aver the said things in a verified complaint, in lieu of presenting a separate affidavit of their truth. There is no rule for oral proof of them, and if the bar would conform to the rule it would be appreciated by the court, for the profession is a learned one."

See, however, the dictum in *Merril v. Merrill*, 41 App. Div. 343, 58 N. Y. Supp. 503, as follows: Though the plaintiff in an action is bound to negative condonation and *must prove the fact should the defendant make default*, yet if defendant interposes an answer and relies upon condonation as a defense, he must allege the same and establish it by proof. See this case also for facts which were held to establish condonation.

Where a defendant in an action for divorce fails to appear or answer, the court cannot on its own motion examine the plaintiff to show that he was guilty of adultery and deny the decree upon that ground. *Thompson v. Thompson*, 127 App. Div. 296; 111 N. Y. Supp. 426.

If a complaint is verified and alleges the averments required to be set forth by Rule 72 of the Supreme Court Rules, it is, in view of the incompetency imposed by section 831 of the Civil Code, *prima facie* evidence of the facts set forth, and the burden of proof is thereby shifted upon the defendant, who is bound to controvert and disprove such allegations as a matter of affirmative defense. *Farace v. Farace*, 61 How. Pr. 61, 1 Civ. Proc. R. 419.

Where the application is made for a judgment of divorce upon a default of the defendant, the court is required to scrutinize the testimony closely and not grant a judgment where it is doubtful, uncertain or unsatisfactory. *Moore v. Moore*, 14 Week. Dig. 255.

INTERLOCUTORY JUDGMENT.

In order to guard against collusion, and to prevent a decree obtained by fraud, no final judgment in an action to annul a marriage or for absolute divorce can be entered until three months have expired since the decision was filed. The judgment entered on the decision is interlocutory for that period. Both the interlocutory and final judgments must be entered within times set by the statute, and cannot be entered thereafter, except the court so order on excuse shown.

Code Civ. Proc. § 1774 (in part). Regulations respecting judgment.

No final judgment annulling a marriage, or divorcing the

parties and dissolving a marriage, shall be entered, in an action brought under either article first or article second of this title, until after the expiration of three months after the filing of the decision of the court or report of the referee. Such decision or report must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and cannot be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. Within thirty days after the expiration of said period of three months final judgment shall be entered as of course upon said decision or report, unless for sufficient cause the court in the meantime shall have otherwise ordered. Upon filing the decision of the court or report of the referee, a judgment annulling a marriage or divorcing the parties and dissolving a marriage, shall be interlocutory only and shall provide for the entry of final judgment granting such relief three months after entry of interlocutory judgment unless otherwise ordered by the court. The final judgment must be entered within thirty days after the expiration of said period of three months and cannot be entered after the expiration of such period of thirty days except by order of the court on application and sufficient cause being shown for the delay. The interlocutory judgment may, in the discretion of the court, provide for the payment of alimony until the entry of final judgment; it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the entry of final judgment in said action.

There is an English statute of similar import.

In 1860 in order to prevent connivance or collusion it was enacted by Parliament that in actions both for divorce

and annulment, there should be in the first instance a decree *nisi* which should not be made absolute until the expiration of three months, a period subsequently enlarged to six months. During that period any person could intervene and show cause why the divorce should not be made absolute. Power was also given to the Queen's proctor to intervene if led to suspect that the parties were acting in collusion. 27 Enc. Brit. 478.

Where three months have expired since an interlocutory judgment of divorce the entry of final judgment is not a mere matter of form. At the end of the three months the granting of a final judgment is subject to further consideration and denial by the court, the purpose of the statute being to prevent fraudulent and collusive judgments and speedily prearranged remarriages. *Matter of Crandall*, 196 N. Y. 127.

The entry of final judgment in an action for annulment is postponed for three months in order to allow an application to open a default for a new trial, etc., before the entry of final judgment, but in the absence of an order affecting the interlocutory judgment made within three months after the entry, the plaintiff is entitled to final judgment as a matter of course. *Bernzott v. Bernzott*, 122 App. Div. 543; 107 N. Y. Supp. 424.

The amendment to section 1774 of the Code of Civil Procedure providing that in an action to annul a marriage final judgment must be entered within thirty days after the expiration of three months from the entry of the interlocutory judgment unless the delay be excused is retroactive, and applies to interlocutory decrees entered before the amendment took effect. *Brown v. Brown*, 63 Misc. Rep. 110; 115 N. Y. Supp. 1039.

Interlocutory decree does not dissolve marriage.

An interlocutory judgment in an action for divorce does

not dissolve the marriage but merely provides for a final judgment which shall accomplish that result. *Matter of Crandall*, 196 N. Y. 127.

Notice before entry.

Where the defendant in an action for divorce fails to appear on the trial at special term after issues of fact have been submitted to the jury, the plaintiff cannot enter an interlocutory judgment without notice to the defendant. A decision must be filed before the interlocutory judgment can be entered. *Boller v. Boller*, 96 App. Div. 163, 89 N. Y. Supp. 200.

When time begins to run.

The three months upon the expiration of which a final judgment of divorce may be entered begins to run from the date of the entry of the interlocutory judgment not from the date of the filing of the referee's report. *Gibson v. Gibson*, 40 Misc. Rep. 103; 81 N. Y. Supp. 343.

A delivery of an interlocutory decree of divorce to the deputy clerk of the court in which the action was tried, is not an entry thereof. Such decree may not be entered *nunc pro tunc* but sufficient cause being shown it may be filed forthwith. *Townsend v. Townsend*, 50 Misc. Rep. 277; 100 N. Y. Supp. 464.

Form of decision.

A short form of decision in an action to annul a marriage is not proper since the amendment to section 1022 of the Code of Civil Procedure made by chapter 85 of the Laws of 1903. *Wander v. Wander*, 111 App. Div. 189; 97 N. Y. Supp. 586.

FINAL JUDGMENT.

As has been shown in the preceding section a final decree of divorce or annulment can only be entered when three months have expired since the interlocutory decrees.

And a special direction of the court is essential before a final decree of divorce can be entered.

General Rule 76 (in part).

No judgment in an action for divorce shall be entered except upon the special direction of the court.

Final judgment cannot be entered in an action of divorce

unless the interlocutory judgment was filed more than three months before the application. The fact that it was signed more than three months before a motion for final judgment is insufficient. *Rothstein v. Rothstein*, 40 Misc. Rep. 101, 81 N. Y. Supp. 342.

Rule 76 of the General Rules of Practice, providing that no judgment in an action for divorce shall be entered except upon special direction of the court is not inconsistent with section 1774 of the Code of Civil Procedure providing for the entry of final judgment on the expiration of three months after the interlocutory judgment. The interlocutory judgment may contain the special direction required by rule 76 as to the entry of judgment and in such case the clerk may enter the final judgment as of course on the expiration of the time limited. But before entering such judgment the court should require proof by affidavit that no order of the court has intervened since the interlocutory judgment. *Phillips v. Phillips*, 45 Misc. Rep. 232; 92 N. Y. Supp. 78.

The effect of a final judgment of annulment, divorce, or separation has been treated under those captions, ante, pp. 44, 79, 105.

But a final judgment of divorce, or separation may be subsequently modified as respects alimony and the custody and support of children.

If the wife remarry after obtaining a divorce a decree for alimony must be annulled.

The decisions as to the modification of alimony are treated under that caption, post. p. 219.

Code Civ. Proc. § 1771. Custody and maintenance of children, and support of plaintiff.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the

children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires for the custody, care, education and maintenance of any such child or children in such final judgment or order or orders. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained. Where an action is brought by a wife, as prescribed in article second of this chapter, and a final judgment of divorce has been rendered in her favor, the court, upon the application of the defendant on notice, and on proof of the marriage of the plaintiff after such final judgment, must by order modify such final judgment and any orders made with respect thereto, by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the plaintiff.

Final decree, how far conclusive.

The statute states the effect of a decree of annulment. A decree of divorce may be vacated for fraud, etc. (see post. p. 177), as to the conclusiveness of foreign divorces, see that caption, post, p. 239.

Code Civ. Proc. § 1754. Judgment annulling a marriage; how far conclusive.

A final judgment, annulling a marriage, rendered during the lifetime of both the parties, is conclusive evidence of the invalidity of the marriage in every court of record or not of record, in any action or special proceeding, civil or crim-

inal. Such a judgment rendered after the death of either party to the marriage, is conclusive only as against the parties to the action, and those claiming under them.

A decree of separation in favor of a wife bars an action by the husband for annulment upon the ground of fraud and duress. *Durham v. Durham*, 99 App. Div. 450; 91 N. Y. Supp. 295.

VACATING JUDGMENT.

A final decree rendered in a matrimonial action may be vacated for fraud or collusion on motion, or in an action brought for that purpose.

A decree of separation may be revoked where the parties become reconciled.

Code Civ. Proc. § 1787. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time, by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

For decisions under above section, see *ante* p. 132.

A judgment of separation entered by consent on findings agreed to by the parties without evidence supporting the allegations of the complaint is void, and the defendant by consenting to such judgment is not estopped from attacking its validity. *Boyer v. Boyer*, 129 App. Div. 647; 114 N. Y. Supp. 15.

The mere denial of a motion to open a default in an action to annul a marriage is not a bar to an action for that purpose although the motion was decided after a full consideration of the merits. *Everett v. Everett*, 180 N. Y. 452.

Where a judgment has been rendered in this state annulling a marriage, the courts of this state may entertain a suit to set it aside on the ground of fraud, and the summons therein may be served by publication upon a nonresident husband by whom the judgment was obtained. *Everett v. Everett*, 22 App. Div. 473; 47 N. Y. Supp. 994.

The rule that a default will not be opened to permit defenses not meritorious to be interposed is not applied in actions for absolute divorce; in which actions it has been the frequent practice to open default, except where there has been laches, or where it may be made to appear that injustice would result in permitting the opening of the default. *Hamilton v. Hamilton*, 29 App. Div. 331; 51 N. Y. Supp. 365.

The rules governing the opening of defaults in ordinary actions do not apply in actions for divorce. Thus, the court will open a judgment taken by default where it appears that the defendant was too ill to attend the trial although she did not present a sworn statement to that effect at the time of trial. *Henderson v. Henderson*, 83 App. Div. 449; 82 N. Y. Supp. 444.

The default of a wife in an action for divorce will be opened where the jury disagreed on three former trials and at the last trial the defendant was ill and without funds to prosecute the case. The Special Term may open a default taken at Trial Term, the remedy not being limited to an appeal from the order of the Trial Term. A default, strictly speaking, cannot be made in an action for divorce as the court is vigilant to prevent collusion. *Mott v. Mott*, 134 App. Div. 569; 119 N. Y. Supp. 483.

A decree of separation in favor of a defendant husband will be vacated if no guardian ad litem was appointed for the infant wife at the time of the decree and the plaintiff moves within two years from the time of entry although more than one year has elapsed since her majority. The failure to appoint such guardian is not a mere irregularity, but is an error in fact not arising upon trial under section 1283 of the Code of Civil Procedure so that the judgment may be vacated at any

time within two years under section 1290. *Byrnes v. Byrnes*, 109 App. Div. 535; 96 N. Y. Supp. 306.

Notice of motion to vacate a judgment of divorce upon the grounds of fraud may properly be served upon the wife's attorney of record. *Gebhard v. Gebhard*, 25 Misc. Rep. 1; 54 N. Y. Supp. 406.

Effect of death of party.

The plaintiff, in an action for divorce, died after having recovered judgment, and the defendant sought to have the judgment set aside for fraud and irregularity. It was held that she could not obtain relief by motion on notice to plaintiff's administrator. *Watson v. Watson*, 1 Hun, 267.

Where the plaintiff in an action for divorce dies after judgment in his favor, the defendant cannot move in the same action to vacate the judgment on the ground that it was improperly obtained. The remedy is to bring a separate action against all the heirs and other persons interested in the plaintiff's estate, grantees thereof subsequent to judgment and his personal representatives. *Groh v. Groh*, 35 Misc. Rep. 354; 71 N. Y. Supp. 985.

Action by party to second marriage to vacate former divorce.

When a court having jurisdiction of parties and subject-matter decrees an absolute divorce, with leave to the wife to marry again, and she does so marry, her second husband cannot maintain an action to have the judgment of divorce annulled, and his marriage declared void on the ground that the judgment of divorce was obtained fraudulently and by collusion. *Ruger v. Heckel*, 85 N. Y. 483.

Vacating judgment after remarriage of parties.

A judgment of divorce may be vacated for irregularity affecting the jurisdiction of the person, even after the prevailing party has married again; but this should be done with hesitation, and only after the gravest and most careful consideration. *Wortman v. Wortman*, 17 Abb. Pr. 66. The judgment in such a case may also be vacated on the ground of collusion or fraud; but it must be made apparent that the moving party is acting from good motives, and not from any expectation of personal advantage, such as regaining a support. *Singer v. Singer*, 41 Barb. 139.

A judgment of divorce may be opened and the defendant

allowed to come in and defend, even after the plaintiff has married again, where the plaintiff's second wife is shown to have combined with him fraudulently to procure the divorce. *Denton v. Denton*, 41 How. Pr. 221.

Where the plaintiff has married an innocent person, after a judgment by default, the court, on opening the decree, will allow the judgment to stand until the final determination of the action. *Von Rhade v. Von Rhade*, 2 T. & C. 491.

When decree will not be vacated.

Proof must be clear and satisfactory to induce the court to interfere with a regular judgment alleged to have been fraudulently obtained. It is not sufficient merely to raise a suspicion or to show constructive fraud, but there must be proof of actual fraud in hearing the motion for a vacation of the judgment. The Special Term has no power to reverse or add to or subtract from the decision of the referee. To obtain such a result the remedy is by appeal where the decision of the referee could be reviewed. *Jones v. Jones*, 71 Hun, 519; 54 N. Y. St. Repr. 885; 24 N. Y. Supp. 1031.

A motion to vacate a judgment for separation will not be granted while the defendant is in default in payment of alimony. *Knauer v. Knauer*, 121 App. Div. 750; 106 N. Y. Supp. 490.

A motion by a wife to open a judgment of absolute divorce taken by default will not be granted where she does not present an affidavit of merits or a proposed answer or deny the misconduct set forth in the complaint except by stating that she has a good and valid defense. *Maguire v. Maguire*, 75 App. Div. 534; 78 N. Y. Supp. 312.

The plaintiff in an action for divorce upon being informed by the referee in the action that he had reported in her favor, and granted a divorce, remarried believing herself legally divorced, but the decree

was not entered in fact until after such marriage. Upon a motion by the defendant to set aside the decree on the ground of the plaintiff's adultery, it was held that under the circumstances, it was not sufficient ground for refusing a decree if it had been known to the court when applied for, and was not sufficient ground for vacating such decree. *Robertson v. Robertson*, 9 Daly, 44.

Upon a motion made to open a judgment of absolute divorce recovered by a wife against her husband the allegations contained in the moving affidavits, used upon such motion, showing that the husband had suspicion as to the fidelity of his wife, and charging that the wife had committed adultery, are entitled to no consideration, where, prior to the obtaining, by the wife, of the judgment sought to be opened, the husband had instituted an action for divorce against his wife which had been dismissed; and also an action against another for the alienation of the wife's affections which resulted in a verdict and judgment for the defendant therein. *Weidner v. Weidner*, 85 Hun, 432; 66 N. Y. St. Repr. 211; 32 N. Y. Supp. 894.

Insufficiency of testimony, upon which a divorce was granted, does not form a ground for setting aside the decree, after the lapse of several months, unless there was an entire failure of evidence. *Rice v. Rice*, 22 Week, Dig. 258.

A decree of divorce will not be set aside on motion merely because the referee erred in admitting improper testimony, where there was other testimony sufficient to establish the fact in issue. *Robertson v. Robertson*, 9 Daly, 44.

A decree of divorce will not be set aside on the application of the defendant wife because her husband failed to keep his agreement to pay her a certain sum provided she made no defense. A delay of five years by the wife in bringing an action to vacate the judgment is such laches as defeats the action where the defendant in the meantime has remarried and has had issue. *Whittle v. Whittle*, 60 Misc. Rep. 201; 111 N. Y. Supp. 1078.

A judgment will not be opened for irregularity where the defendant has been guilty of laches which are not excused. The motion should be made within a year. *Schmidt v. Schmidt*, 1 Week. Dig. 24.

Where a decree for divorce for adultery was regularly obtained by the wife while the husband was a convict in state prison, the court refused to open the decree to enable the husband to set up condonation. *Hoffmire v. Hoffmire*, 7 Paige, 60.

APPEALS.

An appeal from a decree in a matrimonial action lies to the Appellate Division, to the Court of Appeals, and, where an

interpretation of the full faith and credit clause of the Federal Constitution is involved, to the United States Supreme Court.

Appeal to Appellate Division.

The rules applicable to an appeal from a judgment of nonsuit in a cause tried before a jury do not apply to an appeal from a judgment dismissing the complaint in a divorce action for failure to prove the defendant's guilt as in such action it is for the court to determine the facts. *Schulze v. Schulze*, 83 App. Div. 375; 82 N. Y. Supp. 266.

While the Appellate Division by virtue of its right to review facts may award a new trial on the ground that the plaintiff was entitled to a decree annulling her marriage, it cannot confirm an unwarranted judgment in favor of the defendant on the ground of collusion between the parties, where no such issue was raised at trial. *Svenson v. Svenson*, 178 N. Y. 54.

On appeal from an order denying alimony *pendente lite* the Appellate Division has power to do what the special term should have done. *Haddock v. Haddock*, 75 App. Div. 565; 78 N. Y. Supp. 304.

A judgment of divorce will be reversed on appeal, if the referee's report on which it was entered does not find, upon the issues made by the pleadings, as to the guilt on the part of the successful party. *Price v. Price*, 9 Abb. Pr. N. S. 291.

Where a judgment of annulment of marriage is taken on default and contains erroneous provisions, the proper remedy is by motion to correct the judgment and not by appeal. *Park v. Park*, 24 Misc. Rep. 373; 53 N. Y. Supp. 677.

Appeal to Court of Appeals.

Where the General Term finds upon conflicting evidence that there is evidence to support a finding of adultery, the Court of Appeals is bound by the decision. *Lowenthal v. Lowenthal*, 157 N. Y. 236.

Where a decree of divorce in favor of the defendant has been reversed by the General Term on questions of fact and a new trial ordered, an appeal lies to the Court of Appeals and on affirmance judgment absolute can be rendered against the appellant. *Conger v. Conger*, 77 N. Y. 432.

Where the Appellate Division reverses an order reducing the amount of permanent alimony there is an appeal to the Court of Appeals which may review the decision of the Appellate Division. *Livingston v. Livingston*, 173 N. Y. 377; *affg.*, 74 App. Div. 261; 77 N. Y. Supp. 476; *Wetmore v. Wetmore*, 162 N. Y. 593.

Appeal to United States Supreme Court.

While the Federal Courts have no jurisdiction to entertain an action for divorce, yet where the decision of a state court as to the validity of a foreign divorce involves the construction of the full faith and credit clause of the Federal Constitution, an appeal from the decision of the state courts lies to the Supreme Court of the United States, which will determine whether the constitutional question was properly decided. *Andrews v. Andrews*, 188 U. S. 14.

The Supreme Court of the United States may affirm a decree for divorce and alimony *nunc pro tunc* after the death of the husband. *Bell v. Bell*, 181 U. S. 175.

Stay pending appeal.

All proceedings pending an appeal are stayed where an undertaking is given pursuant to section 1327 of the Code of Civil Procedure. *Samuels v. Samuels*, 17 N. Y. St. Repr. 680; 1 N. Y. Supp. 787; *affd.*, 120 N. Y. 663.

Where a plaintiff has been required to give security for payment of alimony by way of a mortgage on lands he will be compelled to deposit the mortgage with the clerk pending an appeal. *Galusha v. Galusha*, 108 N. Y. 114.

COSTS—LIABILITY FOR ATTORNEYS FEES.

The statute allows the court, in its discretion, to allow costs in any of the matrimonial actions; but in the case of annulment or divorce, though the costs be made part of the interlocutory judgment payment cannot be enforced until final judgment. Where the guilt of a co-respondent who intervenes in the action is not established, he is entitled to costs.

Code Civ. Proc. § 1769 (in part). Costs.

The final judgment in such an action [divorce or separation] may award costs, in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case, or the court may, in the judgment, or by an order made at any time, direct the costs to be paid out of any property sequestered, or otherwise in the power of the court.

Code Civ. Proc. § 1774 (in part).

The interlocutory judgment may, in the discretion of the court, provide for the payment of alimony until the entry of final judgment; it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the entry of final judgment in said action.

Code Civ. Proc. § 1757 (in part).

In case no one of the allegations of adultery controverted by such co-respondent shall be proved, such co-respondent shall be entitled to a bill of costs against the person naming him as such co-respondent, which bill of costs shall consist only of the sum now allowed by law as a trial fee, and disbursements, and such co-respondent shall be entitled to have an execution issue for the collection of the same.

Where after a compromise by which the husband agreed

to pay his wife's attorney he refused to do so and filed an answer, the court, on the application of the wife, may compel him to pay costs and the expenses as fixed by the court. *Smith v. Smith*, 35 Hun, 378, *affd.* 99 N. Y. 639.

A husband cannot be adjudged in contempt for failure to pay costs and expenses of an action for divorce. *Shepard v. Shepard*, 99 App. Div. 308; 90 N. Y. Supp. 982.

No costs will be allowed where both parties by collusion have produced false testimony. *Beadleston v. Beadleston*, 19 N. Y. St. Repr. 747; 2 N. Y. Supp. 809.

No costs will be given where a decree of divorce is obtained against the wife. *De Rose v. De Rose*, Hopk. 100.

Where the jury has disagreed on the issue as to the existence of a marriage in an action for separation, the husband while liable for additional alimony, should not be charged with the expenses of furnishing the alleged wife with the stenographer's minutes of the trial, they not being taxable as a disbursement. *Herrmann v. Herrmann*, 88 App. Div. 76; 84 N. Y. Supp. 736.

In matrimonial actions the wife's attorney is usually allowed counsel fees payable by the husband *pendente lite* (see alimony, *post*, p. 188).

But in some cases he may sue the husband after final judgment for services rendered.

It is a misdemeanor to advertise to procure divorces.

Penal Law. § 120. Advertising to procure divorces.

Whoever prints, publishes, distributes or circulates, or causes to be printed, published, distributed or circulated any circular, pamphlet, card, hand bill, advertisement, printed paper, book, newspaper or notice of any kind offering to procure or to aid in procuring any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage, appear or act as attorney or counsel in any suit for alimony or divorce or the severance, dissolution or annulment of any marriage, either in this state or elsewhere, is guilty of a misdemeanor. This section shall

not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this state.

A husband is liable for legal services rendered to his wife in an action brought by her for separation. In such action the plaintiff must prove that the suit was for the protection and support of the wife and that the institution thereof was reasonable and proper. *Quære*, as to whether the same rule exists in an action for divorce. *Naumer v. Gray*, 28 App. Div. 529, 51 N. Y. Supp. 222.

A husband is liable for the value of an attorney's services rendered to his wife in her defense of an action for separation, even though the parties are reconciled and the action discontinued. *Hays v. Ledman*, 28 Misc. Rep. 575; 59 N. Y. Supp. 687.

An attorney cannot recover from a husband for legal services rendered to the wife in an action for separation, where the action is still pending in charge of a substituted attorney who has procured an order for alimony and counsel fees and the husband and wife are still unreconciled and living apart. *Damman v. Bancroft*, 43 Misc. Rep. 678; 88 N. Y. Supp. 386.

Although a wife has successfully defended an action to annul a marriage on the ground of physical incapacity and fraud, the court cannot compel her husband to pay for the past services and expenses of her counsel. *Schroter v. Schroter*, 57 Misc. Rep. 199; 107 N. Y. Supp. 1065.

A contract giving an attorney a contingent fee for the prosecution of an action for separation is void as against public policy, and he is entitled to no lien upon the sum which the husband agreed to pay his wife in lieu of alimony, if the parties are reconciled and discontinued the action. This is true although the reconciliation be collusive and for the purpose of depriving the attorney of his fee. *Matter of*

Brackett, 114 App. Div. 257; 99 N. Y. Supp. 802, *affd.* without opinion, 189 N. Y. 502.

An attorney at law cannot appropriate alimony awarded to the wife to pay disbursements. *Matter of Bolles*, 78 App. Div. 180; 79 N. Y. Supp. 530.

CHAPTER VIII.

ALIMONY; SUPPORT AND CUSTODY OF CHILDREN.

Alimony is made the subject of a separate chapter, although logically it is on the one hand a matter of practice (alimony *pendente lite*), and, on the other, a matter of substantive law (permanent alimony)—the continuation of a *quasi* matrimonial relation to which the husband is held is as a penalty for a violation of marital obligations. The record of litigation on this subject is voluminous, so voluminous indeed as to make it appear that the amount of alimony and the enforcement of payment are more hotly contested than the dissolution of the bonds of matrimony.

It seems to be useless to set out the numerous decisions on this subject, as the amount of alimony is fixed wholly as a matter of equity, dependent on the circumstances of the parties. The cases that illustrate the leading principles are selected.

Alimony is an obligation imposed solely upon the husband, and is based upon his obligation to support his wife.

There are two forms of alimony:—

- (1) Alimony *pendente lite*, which, on a proper showing, is awarded to the wife, together with counsel fees, to enable her to prosecute or defend a matrimonial action.
- (2) Permanent alimony awarded in a decree of divorce or separation, which continues until the obligation is annulled or modified as hereinafter stated.

As a right to alimony is predicated on the existence of a marital relation, no alimony will be granted, either *pendente*

lite, or by final judgment if it appear that there is no binding marriage.

A wife suing to annul a marriage because of the lunacy of her husband at the time of the contract is not entitled to counsel fees and alimony *pendente lite*, as the obligation of the husband for such alimony exists only by virtue of the marriage relation. *Jones v. Brinsmade*, 183 N. Y. 258.

This principle will appear clearly by the authorities cited under the following headings.

ALIMONY PENDENTE LITE.

There is a statutory provision for alimony and counsel fees *pendente lite* only in the case of actions for divorce or separation. This because these two actions are based on the existence of a valid marriage.

But, irrespective of statutory authority, the court will grant alimony and counsel fees pending an action brought by a husband to annul the marriage; but not where the wife attacks the validity of the contract.

Code Civ. Proc. § 1789 (in part). Alimony, expenses of action and costs; how awarded.

Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties.

Suit for annulment.

Where an action to annul a marriage is brought against the wife, the court has power to award alimony *pendente lite*

and counsel fees, although there is no statutory authority therefor. *Jones v. Brinsmade*, 183 N. Y. 258.

Where a wife sues to annul a marriage for a cause going to the legality of the original contract, the allegations of her complaint are taken as true, against herself, and hence, she is not entitled to alimony to maintain the suit. *Jones v. Brinsmade*, 183 N. Y. 258; *North v. North*, 1 Barb. Ch. 241; *Bartlett v. Bartlett*, *Clarke's Chancery*, 460.

In an action brought by a husband to have his marriage with the defendant declared void on the ground that she had a former husband living at the time it was celebrated, the court has power to make an order allowing a defendant a counsel fee *pendente lite*. *O'Dea v. O'Dea*, 31 Hun, 441; *affd.*, 95 N. Y. 667. The Code has not changed the law as it existed under the Revised Statutes allowing counsel fees in a husband's action to annul a marriage. *Lee v. Lee*, 66 How. Pr. 207.

Where a marriage is sought to be annulled by the husband on the ground that the wife had another husband living, the wife is entitled to alimony and counsel fees *pendente lite*. *Wabberson v. Wabberson*, 27 Misc. Rep. 125; 57 N. Y. Supp. 405.

In an action to annul a ceremonial marriage the Supreme Court has power to grant alimony and counsel fees *pendente lite*, although the provisions of the Code of Civil Procedure are silent as to alimony and counsel fees. *Higgins v. Sharp*, 164 N. Y. 4.

The weight of authority is against the allowance of alimony and counsel fees in an action brought by a wife to annul her marriage on the ground that she had not arrived at the age of legal consent. *Herron v. Herron*, 28 Misc. Rep. 323; 59 N. Y. Supp. 861, citing *Meo v. Meo*, 22 Abb. N. C. 58.

Where, in an action to annul a marriage, it clearly appears on the motion for an allowance for counsel fees and support that the defendant asking the allowance had been married before, and her husband was living at the time of her second espousal, the motion will be denied since there was no second marriage, and such allowance is predicated

upon the marriage relation. *Hopper v. Hopper*, 92 Hun, 415, 71 N. Y. St. Repr. 664, 36 N. Y. Supp. 610.

The decision in *Gore v. Gore*, 103 App. Div. 74; 92 N. Y. Supp. 654; which allowed temporary alimony to a wife suing to annul a marriage because of the impotency of her husband is disapproved in *Jones v. Brinsmade*, 183 N. Y. 258.

A wife in order to obtain alimony and counsel fees pendente lite must make prima facie proof of a valid existing marriage, and that she has a meritorious defense or cause of action.

Proof of marriage.

As the allowance for alimony is only authorized in favor of the wife, it must be admitted, or proof must be submitted sufficient to authorize the court to determine, that the applicant stands in the relation of wife to the opposite party, and if, in answer to her allegations of marriage, facts are stated showing that the applicant was not competent to contract such a marriage and did not thereby become a wife, such facts must be denied or explained to the satisfaction of the court; if left uncontroverted the court is not justified in making an allowance. *Collins v. Collins*, 71 N. Y. 269.

The right of a wife to counsel fees for the purpose of carrying on a matrimonial action depends upon the existence of the relation of husband and wife and hence, where a wife moves to set aside a judgment of divorce in her favor on the ground that she was induced to bring the action by duress, she is not entitled to counsel fees as the parties are no longer husband and wife. It seems, however that on a motion to set aside an irregular judgment or one obtained by fraud affecting the jurisdiction, the court may order counsel fees if necessary, for in such case the marriage is not legally dissolved. *Lake v. Lake*, 194 N. Y. 179.

Where the marriage is denied by the answer, alimony will not be granted until it is proved, but a reasonably plain case will justify an allowance of temporary alimony as it need not be so conclusively established as for permanent alimony. *Brinkley v. Brinkley*, 50 N. Y. 184.

The burden of proof is upon the applicant to establish the fact of marriage with a reasonable degree of certainty. Where, at the time of the alleged marriage the applicant believed herself competent to marry, but in fact was under a disability rendering the marriage void, but such disability subsequently ceasing, proof of cohabitation thereafter without any new marriage contract, and in reliance simply on the validity of the original marriage, is not at all proof of the validity of the marriage for the purpose of such application. *Collins v. Collins*, 80 N. Y. 1.

If the undisputed facts raise the presumption that the parties were married, so that the affirmative rests upon the husband to repel the presumption, the court may make temporary allowance although the party in opposition to the motion appears to repel the presumption. *Kinzey v. Kinzey*, 7 Daly, 460.

Where the cohabitation was originally illicit and the marriage in fact is not shown, no alimony or counsel fee will be allowed. *Humphreys v. Humphreys*, 49 How. Pr. 140.

Nor where the defendant admits facts showing that she is not the plaintiff's wife. *Appleton v. Warner*, 51 Barb. 270.

Alimony *pendente lite* should not be allowed, unless the existence of the marital relation is admitted or proven to the satisfaction of the court. *Brinkley v. Brinkley*, 50 N. Y. 184; *Collins v. Collins*, 71 N. Y. 269; *Kinzey v. Kinzey*, 7 Daly, 460; *Collins v. Collins*, 80 N. Y. 1; *Humphries v. Humphries*, 49 How. Pr. 140.

Where, in an action brought by a husband, the wife sets up a divorce from the plaintiff in another state, and admits her subsequent marriage to another, temporary alimony and expenses should not be denied on the ground that it does not appear that she is the plaintiff's wife, since that is one of the issues to be tried. *Starkweather v. Starkweather*, 29 Hun, 488.

In a husband's bill for divorce the court will not order an allowance for support or for expenses before answer disclosing the defense. *Lewis v. Lewis*, 3 Johns. Ch. 519.

Probability of success in action.

A wife is not entitled to alimony *pendente lite* in an action for separation unless she shows that she has reasonable grounds to commence an action and that there is a reasonable probability of success. *Heyman v. Heyman*, 119 App. Div. 182; 104 N. Y. Supp. 227.

Where the charges in a wife's complaint in an action for divorce were made entirely upon information and belief,

and were denied by the defendant's affidavits before answering, and the plaintiff offers no evidence of reasonable probability of success, alimony and counsel fees should not be granted. *Downing v. Downing*, 23 App. Div. 559; 48 N. Y. Supp. 727.

It is a general rule that courts will not try the merits upon affidavits in questions of alimony, but the rule is subject to the qualification that when it clearly appears that the success of the husband is inevitable, and undisputed, and independent facts show that the wife has no reasonable hope of success, alimony will be refused. The defendant in applying for temporary alimony must show that she has a meritorious defense. *Stearns v. Stearns*, 33 App. Div. 630; 53 N. Y. Supp. 348.

There is an exception to the rule that alimony will be awarded to the defendant wife, for example where she does not interpose a meritorious defense, or where the defense is merely to deceive the court and obtain the benefit of an allowance. *Stearns v. Stearns*; 33 App. Div. 630; 53 N. Y. Supp. 348.

A court should require the wife, when plaintiff, upon the application for alimony *pendente lite*, to show that the action is brought in good faith before compelling the husband to pay her money to enable her to prosecute the action, although the motion may be made upon affidavits and before a copy of the complaint has been served; yet in such case the affidavits must allege in substance all the facts necessary to make a good complaint in the action. If the action is for adultery, the omission to show in the affidavits when or where the defendant committed adultery, precludes the court from granting the order. *Whitney v. Whitney*, 22 How. Pr. 175.

When alimony granted.

On a motion for alimony *pendente lite* in an action for separation the court will not determine upon affidavits the wife's chances of success. She is entitled to alimony unless there be a separation agreement providing for her support or she is guilty of misconduct depriving her of her marital rights. *Hawley v. Hawley*, 95 App. Div. 274; 88 N. Y. Supp. 606.

Where the complaint and affidavits show a cause of action for a divorce within the jurisdiction of the courts of this state, and that the

plaintiff is a resident and the defendant was served in this state and has appeared, the court has power to award alimony to the plaintiff, although she has demurred to the answer alleging that both parties were residing in another state at the commencement of the action, and that the court had no jurisdiction. *Gray v. Gray*, 143 N. Y. 354.

A motion for alimony *pendente lite* will not be denied upon the ground that the husband obligated himself to support his wife by a separation agreement, if he is in default in fulfilling said agreement. *Scheinkman v. Scheinkman*, 64 Misc. Rep. 443; 118 N. Y. Supp. 775.

Where a wife's application to the police court for support from her husband proved unavailing, and she is not living with him and cannot properly do so, alimony and counsel fees will be allowed in an action for separation. *Wood v. Wood*, 30 Misc. 50; 62 N. Y. Supp. 854.

Where a wife's affidavit in an action for separation and for alimony showed that her husband's conduct justified her in leaving him, the rule that she should apply to the police court for support will not be applied, as she is entitled to alimony as distinct from mere support and for counsel fees. *Miers v. Miers*, 35 Misc. 476; 71 N. Y. Supp. 1058.

When the wife is a defendant in a suit for divorce on the ground of adultery she is entitled to an allowance for her support pending the litigation, and to a further sum to enable her to defend the action, if she denies on oath the charge of adultery, although affidavits on the part of the husband are read showing that she is guilty. *Wood v. Wood*, 2 Paige, 108. See, also, *Osgood v. Osgood*, 2 Paige, 621; *Clark v. Clark*, 7 Robt. 284; *Williams v. Williams*, 3 Barb. Ch. 628.

An allowance to the wife for her support and to carry on the suit, whether for divorce or separation, is not a matter of right, but discretionary with the court. *Jones v. Jones*, 2 Barb. Ch. 146; *McDonough v. McDonough*, 26 How. Pr. 193.

When alimony denied.

A wife is not entitled to alimony *pendente lite* where her charges of adultery are made upon information and belief unless she discloses the sources of her information or the grounds of her belief, so as to establish a reasonable probability of success. *Schweig v. Schweig*, 122 App. Div. 786; 107 N. Y. Supp. 904.

Alimony will be denied in an action for separation where the moving papers do not bring the case within any of the provisions of section 1763 of the Code of Civil Procedure. Thus, a wife is not entitled to alimony where she shows that both parties were not residents of the state when the action was commenced, that they were not married here and had not become residents and continued to be such for at

least one year. *Conrad v. Conrad*, 123 App. Div. 384; 107 N. Y. Supp. 1093.

Alimony and counsel fees were denied to the defendant wife in an action for divorce where she admitted the intercourse charged, but justified the same upon the ground that it was committed with her lawful husband, showing in support of such position a decree of a Dakota court, void by reason of the fact that the defendant was not served with process and did not appear. *Bailie v. Bailie*, 30 App. Div. 461; 52 N. Y. Supp. 228.

In a wife's suit for separation where the answer on oath denies or explains the charges fully, the court cannot, upon the complaint and answer, merely, order an allowance. It must at least appear that she has good ground for bringing the suit. *Bissell v. Bissell*, 1 Barb. 430; 3 How. Pr. 242.

A wife will not be granted alimony *pendente lite* in an action for separation where she left home when her husband had been absent for one night on business and the alleged abandonment occurred after the departure of the wife. *Heyman v. Heyman*, 119 App. Div. 182; 104 N. Y. Supp. 227.

Where the action is brought by the husband for a divorce on account of the adultery of the wife, and a gross case is clearly made out against the wife, alimony and counsel fees should not be granted. *Kock v. Kock*, 42 Barb. 515; *Griffin v. Griffin*, 23 How. Pr. 189.

In an action brought by the wife for a limited divorce because of cruel and inhuman treatment, she must make it appear that she has been injured and present a meritorious cause of action. A single instance of cruelty is not sufficient to authorize the court to interfere, although vague charges of cruel treatment be also made against the husband. *Solomon v. Solomon*, 3 Robt. 669; 28 How. Pr. 218; *Bertschy v. Bertschy*, 14 Week. Dig. 111.

An application for alimony may be denied if there is doubt of the plaintiff's ultimate success. *Carpenter v. Carpenter*, 19 How. Pr. 539.

If the petition for alimony does not deny on oath the adultery charged or show some valid defense the application will be denied. If the charges made by the plaintiff of the husband's adultery are founded on information and belief and the defendant positively denies them, and no affidavits are tendered in their support, the order for alimony should not be granted. *Monk v. Monk*, 7 Robt. 153.

Alimony *pendente lite* will not be granted where the wife has independent means of support, or where the measure of the husband's liability has been established by a prior decree or separation agreement.

The power of the court to require a husband to pay counsel

fees to enable his wife to carry on or defend an action affecting the matrimonial relation depends upon the necessity therefor. Hence, where the wife has money sufficient to enable her to carry on or to defend such action, the court will not compel the husband to pay a further sum for that purpose. The burden of showing the necessity for an allowance for counsel fees is upon the wife. *Lake v. Lake*, 194 N. Y. 179.

Where a wife suing for separation is living in her husband's home and is adequately supported by him, she is not entitled to alimony *pendente lite* imposed on the condition that she leave her husband, although the court may award her counsel fees. *Smith v. Smith*, 92 App. Div. 442; 87 N. Y. Supp. 137.

Alimony should not be allowed where it appears reasonably certain that she is not destitute of means of livelihood or property sufficient to carry on her action. *Maxwell v. Maxwell*, 28 Hun, 566.

Temporary alimony will be refused if the conflict of evidence creates doubt of ultimate success, especially where the plaintiff has an income of her own sufficient for support. Counsel fees, however, will be granted where the plaintiff on her own statement makes out a *prima facie* case, and her income is not sufficient to support her and defray the expenses of the suit. *Douglas v. Douglas*, 13 Abb. Pr. 291.

Prior decree fixing husband's liability.

Where a judgment for alimony entered in an action for separation remains in force, the court cannot grant temporary alimony in a subsequent action for divorce as the former decree measures the husband's obligation to support. Such decree can only be modified by a motion in the former action. *Schmalholz v. Schmalholz*, 111 App. Div. 543; 98 N. Y. Supp. 510.

Separation agreement.

A valid subsisting agreement of separation entered into with the intervention of a trustee who indemnifies the husband for the wife's support, is a bar to an allowance of alimony in a subsequent action by the wife for a divorce. *Galusha v. Galusha*, 116 N. Y. 635. See also *Collins v. Collins*, 80 N. Y. 1.

Alimony pendente lite will be refused in an action for absolute divorce where there is a valid subsisting separation agreement between the parties in which they covenant to live separately, and the husband transfers to his wife about one-half of his property. *Grube v. Grube*, 65 App. Div. 239; 72 N. Y. Supp. 529.

Where husband and wife, through a trustee, have entered into articles of separation, and the husband has provided for her support and that of her child, counsel fees and alimony cannot be granted in an action for separation brought by the wife. *Powers v. Powers*, 33 App. Div. 126; 53 N. Y. Supp. 346.

A wife will be refused counsel fees and alimony in an action for separation where the alleged abandonment took place under a separation agreement, and the cruel treatment complained of took place before such agreement. *Curtis v. Curtis*, 29 Misc. Rep. 257; 61 N. Y. Supp. 59.

Counsel fees are usually awarded at the same time as temporary alimony. They are allowed the wife to enable her to prosecute or defend the action, and are thus distinguished from alimony which is for her support.

The court is moved by the same considerations in awarding counsel fees as in awarding alimony.

The allowance should be paid promptly in order that the wife may prepare her case.

The power of the court, in an action brought by a wife to procure a separation, to make an allowance to the wife for counsel fees and expenses, is limited to such sums as may be necessary to enable her to carry on or defend the action; and if an application be made for counsel fees and other expenses after the trial of the action and its determination in favor of the plaintiff, without showing in the moving papers that the money is necessary to enable her further to defend the action or to maintain or prosecute her rights under the judgment, an allowance therefor is unauthorized. *Atherton v. Atherton*, 82 Hun, 179; 64 N. Y. St. Repr. 798; 31 N. Y. Supp. 977; citing *Beadleston v. Beadleston*, 103 N. Y. 402; *McCarthy v. McCarthy*, 137 N. Y. 500.

In *Beadleston v. Beadelston*, 103 N. Y. 402, it was held that the purpose of section 1769 of the Code was to furnish the wife with means to thereafter carry on her action or defend the same during the pendency thereof. There can be no necessity for an allowance to make a defense which has already been made, or solely to pay expenses already incurred. A wife who has defended an action which has proceeded to a referee's report against her, cannot, before judgment and while the action is pending, have an order compelling her husband to pay her a sum for the expenses of such defense, when there is no proof that such sum is necessary to enable her further to carry on her defense in the action.

Counsel fees in an action for divorce should be paid within a reasonable time before trial in order that the wife may have her case properly prepared. *Fennessy v. Fennessy*, 111 App. Div. 181; 97 N. Y. Supp. 602.

In an action brought by a husband for a divorce on the ground of adultery, the plaintiff's poverty is no defense to an application for an allowance for expenses and counsel fees to his wife. He must either furnish the wife with money to enable her to conduct her defense, or abandon his action. Great injustice might be done if the husband were not compelled to furnish to his wife the means of having so important a question of fact as the wife's adultery decided in the usual manner. It is proper, however, to take into consideration the pecuniary ability of the husband and the circumstances in life of the parties, in fixing the amount of the allowance. *Cohen v. Cohen*, 11 Misc. Rep. 704; 66 N. Y. St. Repr. 336; 32 N. Y. Supp. 1082, citing *Hallock v. Hallock*, 4 How. Pr. 160; *Frickel v. Frickel*, 4 Misc. Rep. 382; 24 N. Y. Supp. 483; *Purcell v. Purcell*, 3 Edw. Ch. 194.

If it is clear that the suit cannot be maintained, no allowance should be made to defray the expenses of the suit. *Wood v. Wood*, 8 Wend.

357. And if the complaint is multifarious, an allowance for costs cannot be ordered. *Rose v. Rose*, 11 Paige, 166.

Where all the facts upon which the plaintiff's right to a divorce is based, are denied by the defendant, and the preponderance of evidence seems to be with the latter, alimony should be denied; but if it appear that the plaintiff is poor and unable to pay the expenses of prosecuting her action, an allowance for counsel fees would be proper. *Brennan v. Brennan*, 19 Week. Dig. 342.

In an action for a separation the wife must make it appear that she has been injured, and present a meritorious cause of action before she is entitled to temporary alimony; but she should be granted an allowance for expenses and counsel fees when her own statement makes out a *prima facie* case, and her income is not sufficient to support her and pay the expenses of the suit. *Browne v. Browne*, 9 Civ. Proc. Rep. 180, citing *Douglas v. Douglas*, 13 Abb. Pr. N. S. 291.

An allowance for counsel fees to two counsel ought not to be made unless it is clearly shown that two counsel are necessary to protect the rights of the wife. *Uhlman v. Uhlman*, 51 N. Y. Super. Ct. 361.

An allowance may be granted to enable a wife to sue for divorce, although her husband has an action pending in another state to secure a divorce from her. *Whitney v. Whitney*, 22 How. Pr. 175.

Counsel fees may be awarded the wife in an action brought by the husband to annul the marriage on the ground of fraud and duress. *Lee v. Lee*, 66 How. Pr. 207; *North v. North*, 1 Barb. Ch. 241. Where the action is brought by the husband to nullify a marriage and the final decision is in favor of the wife, the court has power to award her extra expenses and counsel fees, beyond the taxable costs, independently of any statute. *Griffin v. Griffin*, 47 N. Y. 134.

The court, on a proper showing, may in its discretion make an order for additional alimony and counsel fees *pendente lite*; but will not usually reimburse the wife for expenses already incurred.

A wife who brings an action for a divorce and has received an allowance for counsel fees and expenses, is not entitled to a further allowance to cover expenses incurred previous to such second application, unless it appears that such allowance is necessary to enable her further to carry on the litigation. *Stampfer v. Stampfer*, 33 N. Y. St. Repr. 807; 11 N. Y. Supp. 588. If unusual proceedings are taken by the husband, additional alimony may be allowed; while a court has power to increase alimony in an action for divorce

the increase should not be granted, unless new facts are shown which did not exist or were not known to the applicant when the former order was made; otherwise such an application is in effect an appeal from the discretion of one justice to that of another. *Strauss v. Strauss*, 38 N. Y. St. Repr. 478; 14 N. Y. Supp. 671.

An order for an additional allowance of counsel fees may be granted although not made until the entry of a decree of separation and after the services had been rendered, if the wife's counsel was induced to postpone his motion by the defendant's counsel and it was stipulated at trial that the question should be determined by the court upon the settlement of the decree. *Page v. Page*, 124 App. Div. 421; 108 N. Y. Supp. 864; *affd.*, 195 N. Y. 540.

Without showing a change of circumstances affecting the rights of the parties an additional allowance cannot be granted. *Simonds v. Simonds*, 57 Hun, 290; 32 N. Y. St. Repr. 127; 10 N. Y. Supp. 606; *Kittle v. Kittle*, 8 Daly, 72. See also *Forrest v. Forrest*, 5 Bosw. 672; *Morrell v. Morrell*, 2 Barb, 480.

A wife may be allowed alimony and counsel fees to prosecute or defend an appeal, if her cause be meritorious.

The court may award a wife alimony and counsel fees pending an appeal by her husband from a judgment of separation and alimony in her favor, although there was no previous application for alimony and counsel fees *pendente lite*. *Haddock v. Haddock*, 75 App. Div. 565; 78 N. Y. Supp. 304.

The courts of this state have power to grant temporary alimony and counsel fees in an action for separation pending an appeal by the defendant to the Supreme Court of the United States. The order of the Supreme Court of the United States staying the judgment of the state courts pending the appeal stays only the enforcement of the judgment under review and does not affect the power to grant tempo-

rary alimony. *Haddock v. Haddock*, 109 App. Div. 502; 96 N. Y. Supp. 522.

A wife will not be granted alimony and counsel fees pending her appeal from a judgment of divorce unless she shows that the appeal is taken in good faith and that there is reasonable ground to believe that it will be successful. The motion should be made on a case. An affidavit that the appellant is informed by her attorney that her defense was established is insufficient to justify an order for alimony. *Greenberg v. Greenberg*, 134 App. Div. 419; 119 N. Y. Supp. 227.

A wife is not entitled to alimony pending an appeal from a judgment of absolute divorce in favor of her husband and referring the question of alimony, unless she establishes both her inability to support herself pending the reference and appeal and her husband's ability to pay alimony. *Poillon v. Poillon*, 75 App. Div. 536; 78 N. Y. Supp. 323.

Where a husband appeals to the Court of Appeals from the reversal of a judgment annulling his marriage the wife may move for alimony pendente lite although the husband obtained a stay of proceedings. *Di Lorenzo v. Di Lorenzo*, 78 App. Div. 577; 79 N. Y. Supp. 566.

On an appeal from a judgment of divorce in favor of a husband the court has no power to allow the wife a sum to cover services already rendered by her attorney. *Poillon v. Poillon*, 75 App. Div. 536; 78 N. Y. Supp. 323.

An allowance for counsel fees and alimony pending appeal by wife of a judgment of divorce will not be granted as a matter of right, nor until the appellant has made her case on appeal and shown that the appeal is meritorious. *Ganz v. Ganz*, 59 N. Y. Supp. 955.

A wife may have a counsel fee though the husband, on voluntary separation, made provision for her support, where she has answered alleging her husband's adultery. *Miller v. Miller*, 43 How. Pr. 125.

If the husband desires to prosecute further, after the wife has succeeded before the referee, it is proper to award counsel fees to her. *Donnelly v. Donnelly*, 63 How. Pr. 481; and pending an appeal by the husband from part of the judgment in favor of a wife, her counsel may be awarded an additional fee. *Winton v. Winton*, 12 Abb. N. C. 159. This case was reversed by the General Term as reported in 31 Hun, 290, where it was held that after judgment in favor of the wife has been entered in an action brought by her to procure a limited

divorce from her husband, the court has no power to make an order requiring the husband to pay any sum of money to the plaintiff's attorney for services which he has theretofore, or may thereafter, render to her in an action. The fact that the husband has appealed to the Court of Appeals from a judgment of the General Term affirming the judgment of the court below, does not authorize the court to make such an order.

In the case of *McBride v. McBride*, 119 N. Y. 519, the court questions the rule of the General Term in the case of *Winton v. Winton*, and holds that the power exists in case of an appeal from a judgment in an action for divorce to make an allowance for counsel fees during the pendency of the appeal until the final determination of the action.

In the case of *McCarthy v. McCarthy*, 137 N. Y. 500, the court suggests that after entry of judgment in the case of an appeal therefrom, it would be proper for the court to make an allowance for the costs of the appeal, and to include therein expenses already incurred. See also *Halsted v. Halsted*, 11 Misc. Rep. 592; 66 N. Y. St. Repr. 335; 32 N. Y. Supp. 1080; *Winkemeier v. Winkemeier*, 11 App. Div. 201; 42 N. Y. Supp. 583.

The sum allowed as temporary alimony depends upon the financial status of the parties, and the actual needs of the wife. The amount is usually less than that allowed as permanent alimony; but no rule can be formulated.

In fixing the amount, the court should take into consideration the nature of the action, whether or not the wife has a good cause of action, the probable difficulty in proving her case, the strength of the case she is required to meet, the probable expense of carrying on the litigation and the means of the husband, including his expenditures and his apparent condition. Alimony or counsel fees should never be given to a wife merely to punish a husband because he refuses to consent to a reference of the action or because it is shown by the proceedings that he is an unworthy person. *Patterson v. Patterson*, 4 App. Div. 146; 74 N. Y. St. Repr. 502; 38 N. Y. Supp. 637.

In general, temporary alimony must be limited to the wife's actual wants. The expenses of her board and clothing should be estimated as of the place of residence of her

relatives, if she has chosen to reside there. *Germond v. Germond*, 4 Paige, 643; *Simmons v. Simmons*, 2 Robt. 712.

The amount of alimony allowed to a wife pending suit is usually less liberal than a permanent allowance. *Leslie v. Leslie*, 6 Abb. Pr. N. S. 193.

In awarding alimony *pendente lite* the court is not bound to award the wife one-third of her husband's income irrespective of its relation to reasonable expenditures. Thus, a voluntary contribution by a husband of \$25,000 a year for his wife's support is ample although his income is many times greater. *Gould v. Gould*, 61 Misc. Rep. 120; 114 N. Y. Supp. 331.

An allowance of alimony *pendente lite* amounting to nearly 30 per cent of the husband's income is improper where he is permitting his wife to live upon lands owned by him on which he pays charges amounting to \$805 annually. *Bressette v. Bressette*, 95 App. Div. 167; 88 N. Y. Supp. 580.

An allowance of one-third of her husband's income as alimony was held to be excessive where such income was derived solely from his services as an opera singer. It seems that such an allowance when received from investments or from a certain salary not liable to be reduced, might not be excessive. *Cowles v. Cowles*, 29 App. Div. 476; 51 N. Y. Supp. 1057.

The amount of alimony *pendente lite* is in the discretion of the court; and it should be fixed with reference to the husband's resources, including both property and income, the claims of his children and others upon him for sustenance and education, and his ability to provide for himself and family by his own exertions. *Lawrence v. Lawrence*, 3 Paige, 267; *Leslie v. Leslie*, 6 Abb. Pr. N. S. 193; *Gilbert v. Gilbert*, 15 N. Y. St. Repr. 822; 1 N. Y. Supp. 534. Unless the allowance is gross or excessive, so as to show an abuse of judicial discretion, it is not reviewable. *Llamosas v. Llamosas*, 62 N. Y. 618. If there has been a palpable abuse of the discretion of the court, or if the court seems to have been controlled by improper considerations in making the allowance, there is no doubt of the power of the appellate court to review the action of the lower court on appeal. *Patterson v. Patterson*, 4 App. Div. 146; 74 N. Y. St. Repr. 502; 38 N. Y. Supp. 637; citing *Lowenthal v. Lowenthal*, 68 Hun, 366; 51 N. Y. St. Repr. 882; 22 N. Y. Supp. 858. The husband's estate is presumed to yield a reasonable income unless the contrary be shown. *Forrest v. Forrest*, 5 Bosw. 672.

The power of the court to order the husband to provide for his wife during the suit is limited to an allowance of money. *Simmons v. Simmons*, 2 Robt. 712.

Only such sums should be allowed as the husband is able to pay, and sufficient to properly support the wife and enable her to try the cause. *Gilbert v. Gilbert*, 15 N. Y. St. Repr. 822; 1 N. Y. Supp. 534.

The husband's poverty, though no reason for refusing to order an allowance, is to be considered in fixing the amount of alimony. *Hallock v. Hallock*, 4 How. Pr. 160; *Rublnsky v. Rublnsky*, 24 N. Y. Supp. 920.

The court is not limited to what is barely sufficient for the wife's support, but may consider the husband's ability to pay, and also his conduct in the controversy leading to the suit. *Tearle v. Tearle*, *Daily Register*, July 25, 1883.

The fact that a wife, suing for divorce, has some separate property, although a circumstance to be considered, does not bar her rights, or deprive the court of its discretion upon her application for temporary alimony, when it appears that the property did not come to her from her husband, and the income therefrom is not so great as to render all allowances unnecessary. *Merritt v. Merritt*, 99 N. Y. 643.

The husband may be required to pay temporary alimony, if he is earning enough and the wife is out of employment, where both are musicians dependent upon their earnings. *Hoffman v. Hoffman*, 7 Robt. 474.

Where it appears that, pending the suit, the wife's health requires her to travel for a season, the court may order an allowance in a gross sum for that purpose, her regular allowance to be suspended meanwhile. *Lynde v. Lynde*, 4 Sandf. Ch. 373; affirmed 2 Barb. Ch. 72.

See *Deisler v. Deisler*, 65 App. Div. 208; 72 N. Y. Supp. 560, for a case where, in an action for separation, brought upon the same grounds as a prior action in which the defendant succeeded on appeal, it was held that counsel fees and alimony should be denied to the plaintiff, and the alimony limited only to the support of the children.

Where as a condition of the discontinuance of an action for separation the husband executed an instrument agreeing to pay his wife a certain sum, she to recommence the action for separation if he fails to do so, it was held that in the second action an order for alimony and counsel fees at substantially the same rate which he had agreed to pay would not be disturbed. *Van Gieson v. Van Gieson*, 26 App. Div. 347; 49 N. Y. Supp. 781.

Where it appears that the wife has not been entirely free from fault, such an allowance will not be made to her as will operate as an inducement to delay a speedy trial and disposition of the action. *Hardy v. Hardy*, 25 N. Y. St. Repr. 832; 6 N. Y. Supp. 300.

Alimony pendente lite is obtained by motion; it cannot be made part of the final judgment.

Service of papers on a non-resident husband may be made without the state. Decisions on various matters of practice will be found hereunder.

The application for an allowance *pendente lite* should be made upon special application and cannot properly form a part of the final judgment. *Straus v. Straus*, 67 Hun. 491; 50 N. Y. St. Repr. 845; 22 N. Y. Supp. 567; citing *Percival v. Percival*, 14 N. Y. St. Repr. 255; *Williams v. Williams*, 25 N. Y. St. Repr. 183; 6 N. Y. Supp. 645; *Stampfer v. Stampfer*, 33 N. Y. St. Repr. 807; 11 N. Y. Supp. 588; *Pountney v. Pountney*, 32 N. Y. St. Repr. 335; 10 N. Y. Supp. 192.

The question of counsel fees and alimony cannot, except with the consent of counsel, be reserved for decision after the trial of an action, and thus where the complaint has been dismissed after trial the court has no power to award alimony at a specified rate from the time of the commencement of the action or award counsel fees. *Lonsdale v. Lonsdale*, 41 App. Div. 224; 58 N. Y. Supp. 532.

Where the court has jurisdiction of an action for separation brought against a non resident husband who was served by publication, an order requiring him to pay alimony may be served on him personally without the state and on his resident attorney of record, and such service furnishes a basis for a subsequent order adjudging him in contempt for failure to pay after demand made upon him without the state. *Woolworth v. Woolworth*, 115 App. Div. 405; 100 N. Y. Supp. 865.

Where a wife makes out a *prima facie* case entitling her to alimony *pendente lite*, the court should not refuse the application and leave her to the remedy of a criminal prosecution for abandonment. *Weigand v. Weigand*, 103 App. Div. 42; 92 N. Y. Supp. 679.

The technical rules applicable to the renewal of a motion do not obtain on a renewed motion for alimony and counsel fees, pending an action for divorce; it should be recorded as a reargument. *Ensign v. Ensign*, 54 Misc. Rep. 289; 105 N. Y. Supp. 917; *affd.* without opinion, 120 App. Div. 882; 105 N. Y. Supp. 1114.

The wife's affidavits upon motion for alimony must furnish material upon which to base a finding as to her husband's income. *Miller v. Miller*, 27 Misc. Rep. 758, 59 N. Y. Supp. 473.

The objection that affidavits on a motion for alimony were not properly authenticated cannot be taken for the first time upon an appeal from the order granting the motion. *Rogers v. Rogers*, 54 App. Div. 195; 66 N. Y. Supp. 512.

In *Boesenberg v. Boesenberg*, 50 App. Div. 622; 63 N. Y. Supp. 770; it was held that the question of the defendant wife's adultery should not be determined by affidavits on a motion for alimony. "She should have an opportunity to cross-examine the witness whose sworn statements so strongly inculcate her." *Stearns v. Stearns*, 33 App. Div. 630; 53 N. Y. Supp. 348, distinguished.

Application for alimony will be denied in an action for separation brought by the wife upon the ground of cruel and inhuman treatment where the papers therein do not specify the particular nature and circumstances of the defendant's misconduct, as required by section 1764 of the Code, and where the answering affidavits not only disprove the charges of misconduct, but show without contradiction that the plaintiff is living in open adultery. *Mackintosh v. Mackintosh*, 44 App. Div. 118; 60 N. Y. Supp. 679.

It seems, that the court on a motion for alimony pendente lite has no power to compel the husband to allow his wife to use a house owned by him and to compel him to pay the charges thereon. *Bressette v. Bressette*, 95 App. Div. 167; 88 N. Y. Supp. 580.

A motion by the attorney for his fee in the name of his client who has returned to her husband is improper; it should be in his own name. *Chase v. Chase*, 29 Hun, 527; *Louden v. Louden*, 65 How. Pr. 411.

If a husband, being defendant, fail to pay alimony pendente lite, his answer cannot be stricken out nor his defense stayed, as that would be an invasion of his constitutional rights.

But any action by him as plaintiff, or under a counterclaim, will be stayed, as well as any affirmative proceedings.

The enforcement of payment of alimony by contempt proceedings, sequestration, etc., is treated post, p. 225.

The court cannot strike out the answer of a husband in an action for separation and refuse to allow him to defend on the ground that he has failed to pay alimony *pendente lite* as ordered. Such a penalty deprives the defendant of property without due process of law in violation of the 14th amendment of the Federal Constitution. *Sibley v. Sibley*, 76 App. Div. 132; 78 N. Y. Supp. 743.

Where a husband fails to pay alimony *pendente lite*, the wife while not entitled to a stay which will prevent the defendant from contesting an action for separation, is entitled to a stay of affirmative proceedings on his counterclaim for the same relief. *Maran v. Maran*, 137 App. Div. 348; 122 N. Y. Supp. 9.

The court in an action for divorce cannot strike out the defendant's answer because of his failure to pay alimony *pendente lite*, but it may stay affirmative proceedings on his part, such as moving the case for trial. *Harney v. Harney*, 110 App. Div. 20; 96 N. Y. Supp. 906.

Pending final decision of a matrimonial action the court, in its inherent jurisdiction, may dispose of the custody of children of the marriage as may be for their best interests; and in an action for divorce or separation (by statutory authority), may compel the father to provide for their maintenance. This subject is treated in detail post, pp. 208, 216, 224.

Code Civ. Proc. § 1769.

*Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband * * * * * to provide suitably for the education and maintenance of the children of the marriage.*

Pending the proceedings for divorce, the custody of the child may be awarded to one party subject to the right of the other to visit it, with security not to remove it from the jurisdiction of the court. *People v. Paulding*, 15 How. Pr. 167.

Where a husband sued for separation makes a general denial and a countercharge of adultery demanding a divorce, the court may award the custody of the children to the husband although both the complaint and counterclaim are dismissed if there is a finding that the plaintiff left her husband without just cause or provocation. *Light v. Light*, 124 App. Div. 567; 108 N. Y. Supp. 931.

ALIMONY AWARDED BY FINAL JUDGMENT.

CUSTODY OF CHILDREN.

Where a divorce or separation is obtained by either husband or wife the final decree must provide for the custody, support and maintenance of the children of the marriage.

If the decree be entered in favor of the wife it may require the husband to support her.

As the liability for alimony is based on the theory of a valid marriage, no alimony may be awarded in a final decree of annulment.

Code Civ. Proc. § 1771 (in part). Alimony; custody and maintenance of children.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions, as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff.

Code Civ. Proc. § 1759. Regulations when action for divorce is brought by wife.

*Where the action is brought by the wife, the following regulations apply to the proceedings: * * * **

2. The court may, in the final judgment dissolving the

marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties, and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

Code Civ. Proc. § 1766. Separation, support, maintenance, etc. of wife and children.

Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties. And the court may, in such an action, render a judgment, compelling the defendant to make the provision specified in this section, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

A husband's obligation to support his wife arises out of the marital relation and is lost on the dissolution of that relation except as preserved by a decree requiring the payment of alimony. See *Wilson v. Hinman*, 182 N. Y. 408.

It is the better practice to embody a provision for alimony in an interlocutory judgment for divorce so that the

final judgment can be entered in accordance therewith. *Byrnes v. Byrnes*, 126 App. Div. 619; 111 N. Y. Supp. 72.

While the court has inherent power over the custody and control of infants its power to provide for their support in matrimonial actions is purely statutory. *Salomon v. Salomon*, 101 App. Div. 588; 92 N. Y. Supp. 184.

Where an action to annul a marriage is brought by a woman on the ground that there is a subsisting marriage between the defendant and another woman, the judgment cannot award alimony for the plaintiff and for the children, because the plaintiff never was the wife of the defendant. The judgment of annulment can only make provision for the children where the marriage is avoided for lack of legal consent. *Park v. Park*, 24 Misc. Rep. 372; 53 N. Y. Supp. 677.

Former adjudication.

A final judgment of separation entered in favor of the husband without alimony is a conclusive adjudication as to his obligations to support his wife while remaining in full force and effect and his wife is not entitled to alimony although she succeeds in a subsequent action for divorce. *Byrnes v. Byrnes*, 126 App. Div. 619; 111 N. Y. Supp. 72.

Alimony awarded by final decree is in the nature of a vested right which cannot be impaired by subsequent legislation, or by act of the court, unless the power be reserved.

(Modification of alimony as now permitted by statute is treated post, p. 219.)

Neither can alimony be awarded where the husband was served by publication and did not appear.

In the absence of statutory authority, or a reservation of the power, a final decree not awarding alimony cannot be modified so as to make such award.

A final judgment for alimony and for the maintenance of children rendered in an action for divorce is a property

right within article 1 of section 6 of the Constitution, of which the plaintiff cannot be deprived without due process of law, and the subsequent amendment of the Code of Civil Procedure which allowed the court to amend a decree of alimony after final judgment does not apply to decrees theretofore rendered. *Livingston v. Livingston*, 173 N. Y. 377.

A wife has a vested right to alimony which has accrued under the terms of a decree, of which she cannot be deprived by the subsequent action of the courts or of the legislature. *Krauss v. Krauss*, 127 App. Div. 740; 111 N. Y. Supp. 788.

A judgment for alimony and costs cannot be awarded against the defendant in an action for divorce if he was served by publication and did not appear in the action. *Edwards v. Edson*, 119 App. Div. 684; 104 N. Y. Supp. 292.

Chapter 742 of the Laws of 1900 amending section 1759 of the Code of Civil Procedure so as to authorize the court at any time after the entry of a final judgment of divorce in favor of the wife to annul, or modify the provision with respect to alimony and the maintenance of children is unconstitutional in so far as it applies to prior decrees containing no reserved power to annul or amend. Such prior decree of divorce is a vested property right within the protection of the constitution. *Livingston v. Livingston*, 74 App. Div. 261; 77 N. Y. Supp. 476; *affd.*, 173 N. Y. 377.

A decree for permanent alimony is a vested right which cannot be impaired by subsequent events or legislation. The decree establishes the innocence of the wife and hence, a husband cannot attack a decree for alimony upon the ground that his wife was guilty of infidelity. *Goodsell v. Goodsell*, 82 App. Div. 65; 81 N. Y. Supp. 806.

Decree not providing for alimony.

It is the settled law of this state that, unless alimony is

provided for in the final judgment, it cannot be awarded by a subsequent order; but providing for alimony does not necessarily mean the allowance by specific mention of a fixed and definite sum. *Noble v. Noble*, 20 App. Div. 395; 46 N. Y. Supp. 820.

In this case the final judgment contained a reservation of power to grant a further order of allowance in the following words: "The plaintiff may apply at the foot of the judgment, as she may be advised, for such other provision, touching an allowance or otherwise, as any change in the circumstances of the parties may require." This reservation was held to be sufficiently broad to allow an application to be made for provisions for the plaintiff's support.

Where a foreign judgment of divorce awards the custody of a child to the mother, but makes no allowance for its support and maintenance, although the court might have made such provision, such judgment is a bar to an action brought by a wife in this state to recover from the husband an allowance for the support and maintenance of their child. Since the right of the wife to an allowance for the maintenance of the child was one of the questions involved in the action in the foreign state, her claim for such allowance must be held to have been decided adversely to her. *Rich v. Rich*, 88 Hun, 566; 68 N. Y. St. Repr. 823; 34 N. Y. Supp. 854.

The amendment to section 1759 authorizes the court to annul, modify or vary a direction in a final judgment. If the judgment contains no provision for the support of the wife, or the maintenance of her infant daughter, the court cannot insert such provisions therein after final judgment. *Gould v. Gould*, 18 Misc. Rep. 334; 42 N. Y. Supp. 147.

In the case of *Tonjes v. Tonjes*, 14 App. Div. 542, 43 N. Y. Supp. 941; the final judgment was awarded in November, 1894, in an action brought to procure a separation which directed, among other things, that the

plaintiff should have the right to move for an increase of her allowance and alimony in case her mother died. And, if a change occurred in the pecuniary circumstances of her husband, that fact could also be considered, as it was held that in such an action the alimony stood upon a different basis from what it does in an action to dissolve a marriage; as the marriage tie is not severed by separation, the provision for alimony is at all times the subject of equitable protection and control. The amendment, authorizing either party to an action for a separation to move the court to amend, vary or modify the decree, constitutes remedial legislation and should be literally construed. Since the obligation of support and maintenance in a case of separation is a continuing one, the amendment operates upon the subject as it finds it, and its provisions become immediately applicable to a decree of separation in the same manner and to the same extent as any other change in a law operative upon individual rights.

The right to alimony is extinguished by the death of the husband, as his obligation of support then terminates.

Alimony is not a debt discharged by bankruptcy.

Nor does it cease on the remarriage of the wife, except as the court is now required to annul the provision perforce of the recent amendment to the statute. (See post, pp. 219, 223.)

As a wife's right to support does not survive her husband's death, her right to alimony ceases at his death as the latter right is founded upon the former. See *Wilson v. Hinman*, 182 N. Y. 408.

Where a husband ordered to pay alimony and counsel fees *pendente lite* died before paying, his estate is not liable. The wife's attorney cannot collect the counsel fees from the husband's estate as the allowance was made to the wife not to her attorney. *Kellogg v. Stoddard*, 89 App. Div. 137; 84 N. Y. Supp. 1015.

Alimony ceases with the life of the defendant; but, the order may require provision to be made in the defendant's lifetime for the payment of alimony during the joint lives of the parties. *Field v. Field*, 15 Abb. N. C. 434; *Beach v. Beach*, 29 Hun, 181; *Galusha v. Galusha*, 43 Hun, 181; 4 N. Y. St. Repr. 399.

A decree directing the defendant to pay alimony during the wife's natural life, and requiring him to pay premiums upon certain policies

of insurance for her benefit, ceases on the death of the husband, and there is no obligation upon his estate to pay the alimony. Where the decree does not especially impose such obligation upon the estate of the husband, making substantial provision for the wife upon his death, the decree will not be disturbed. The present provisions of the Code permitting a decree of divorce to be changed are not retroactive, and may not be invoked in aid of a judgment entered prior to the enactment of such provision. *Johns v. Johns*, 44 App. Div. 533; 60 N. Y. Supp. 865; *affd.* 166 N. Y. 613.

Where the final decree of the court has been made in an action for divorce on the ground of adultery, directing the payment of alimony to the defendant during the plaintiff's life, it was held that the obligation was personal and the decree must be construed to mean during the lives of both parties and upon the defendant's death the right to further alimony ceases. *Field v. Field*, 15 Abb. N. C. 434; 66 How. Pr. 346.

Bankruptcy no discharge.

A judgment of separation providing for alimony is not a debt provable in bankruptcy, nor is it affected by discharge, and this is true of installments of alimony accruing after adjudication and before the time of the motion. The same is true in regard to counsel fees and temporary alimony. *Matter of Smith*, 30 Civ. Proc. Rep. 95.

Arrears of alimony do not constitute a debt provable in bankruptcy proceedings of the husband, and are not covered by discharge in bankruptcy. *Maisner v. Maisner*, 62 App. Div. 286; 70 N. Y. Supp. 1107.

A discharge in bankruptcy does not discharge liability for alimony, whether accruing before the petition or accruing thereafter. *Young v. Young*, 35 Misc. Rep. 335; 71 N. Y. Supp. 944.

The amount of alimony and the sum for maintenance of children is determined upon equitable principles involving the wealth of the husband, the number of children, and the needs of the wife.

If there be a valid, subsisting separation agreement whereby the husband has obligated himself to support his wife it will be considered in fixing the amount.

No rule can be formulated.

The court should not in general allow the wife alimony to the extent of more than one-third of the husband's estate. See *Collins v. Collins*, 10 Hun, 272, reversed on other grounds, 71 N. Y. 269. See also *Peckford v. Peckford*, 1 Paige, 274; *Miller v. Miller*, 6 Johns. Ch. 91.

A decree in an action for divorce requiring the husband to pay \$300 annually for the support and education of two children and \$500 annually to his wife is not excessive if it amounts to a little more than half of the husband's annual income. *Valentine v. Valentine*, 87 App. Div. 156; 84 N. Y. Supp. 37.

An allowance of \$2,400 per year for the support of a wife and her four children, though representing one-half of the husband's income, is not unreasonable. *Harris v. Harris*, 83 App. Div. 123; 82 N. Y. Supp. 568.

An allowance to a wife of \$1200 or \$1300 per month out of an annual income of \$20,000 is sufficient. *Oatman v. Watrous*, 120 App. Div. 66; 105 N. Y. Supp. 174.

When a woman is divorced from her husband by reason of his adultery, her right to such allowance as may be just, having regard to the circumstances of the parties respectively as they existed at the time the decree is pronounced, is perfect and absolute. *Forrest v. Forrest*, 3 Bosw. 661. And, in *Forrest v. Forrest*, 25 N. Y. 501, the court held that on adjustment of the allowance, where there has been a divorce for adultery, the court may take into account imputations against the wife and of her moral delinquencies. After judgment has passed in her favor, the main subjects of inquiry are the proper measure of the wife's expenditures, the amount and income of the husband's estate and other duties or burdens chargeable upon him. The amount of alimony is largely in the discretion of the court, and while it is not a matter of division of portions of the property of the defendant, the question of suitable support to the extent of the husband's means is an important element.

In determining the income of the husband, where the value only of the estate is shown, and not his actual income, the court will take judicial notice of the fact that without the aid of well-guided business ability and available capital it could not produce a large rate of income. *Galusha v. Galusha*, 43 Hun, 181; 4 N. Y. St. Repr. 399; modified in 116 N. Y. 635; *Simmons v. Simmons*, 2 Robt. 712; *Germond v. Germond*, 4 Paige, 643.

In an action by a wife against her husband for divorce on the ground of adultery, a defendant, after a verdict against him, should be permitted to produce proof, and either on a reference or on a hearing before the court, should be allowed to show such facts as are proper to be considered in determining the amount of alimony, the time when it should commence, etc. *Forest v. Forest*, 6 Duer, 102; 3 Abb. Pr. 144. See, also, *Temporary Alimony*, *ante*, p. 189.

Provision for wife by separation agreement or settlement.

Articles of separation may be considered in fixing alimony and are not annulled by a decree of divorce. *Galusha v. Galusha*, 116 N. Y. 635.

Although a separation agreement be void by reason of the fact that the parties were living together when it was made, the amount which the husband agreed to contribute to the support of his wife may be considered in awarding alimony in a decree of separation. *Tower v. Tower*, 134 App. Div. 670; 119 N. Y. Supp. 506.

Where the defendant has settled property upon his wife, it must be surrendered before alimony can be allowed. *Rose v. Rose*, 11 Paige, 166.

Property of the husband, held by the wife, must be exhausted before he will be called upon to pay. *Osgood v. Osgood*, 2 Paige, 621.

A separation agreement which is void because made when the husband and wife were living together does not prevent the court from granting permanent alimony in a subsequent action for divorce. *Maney v. Maney*, 119 App. Div. 765; 104 N. Y. Supp. 541.

A contract by which a husband agreed to pay his wife a certain sum in lieu of all claims against him, will not bar the right of the wife to apply for alimony in an action for separation if it appears that the contract was made in settlement of litigation between the parties respecting the title to certain lands. *Kelly v. Kelly*, 61 Misc. Rep. 480; 115 N. Y. Supp. 587.

In awarding the custody of children in a final decree of divorce or separation the paramount inquiry is the welfare of the child (this principle obtains where custody is awarded outside the matrimonial actions).

Usually custody is awarded to the party obtaining the decree, but it is customary to allow the other parent access to the child, under such restrictions as the court may see fit to impose.

The decree may, as the statute now stands, be modified as respects the custody of children; not so, however, as to decrees entered before the statute took effect. (See post, p. 219.)

In case of annulment of marriage the statute determines the legitimacy of children as respects the two parents, see ante, pp. 55, 59, 72.

In determining as to the custody of a child, where a judgment of separation is awarded to the husband, the court will consult mainly the welfare of the child. It is open to the wife to satisfy the court, upon a subsequent application, that its welfare will be best promoted by placing it in her custody. *Waring v. Waring*, 100 N. Y. 570.

On granting a divorce to plaintiff the Supreme Court in its discretion may award the custody of the children to the defendant, and where the authority of the court has not been exceeded, an affirmance of the discretion by the Appellate Division is not reviewable by the Court of Appeals. *Osterhoudt v. Osterhoudt*, 168 N. Y. 358.

The rights and custody of the children are to control, and not the merits of the controversy between the parents. *People v. Brown*, 35 Hun, 324. The court's power to award the custody of the children is discretionary and cannot be reviewed by the Court of Appeals. *Price v. Price*, 55 N. Y. 656.

It is settled law in this state that in determining the custody of infants between father and mother, their welfare, and not the supposed rights of the parents, is the controlling principle; nor in a competition does the father start with any superior title; for whatever was the notion in former times and other jurisdictions, at this day and in this country the claim of the mother to her offspring is at least of equal potency. *Perry v. Perry*, 17 Misc. Rep. 28; 39 N. Y. Supp. 863.

By the law of nature, the father has no paramount right to the custody of his child; all other things being equal, the mother is the most proper person to be entrusted with the care of children of tender age. The law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree. *Mercein v. People*, 25 Wend. 103, 106.

But, where the husband obtains a divorce because of the wife's adultery, the husband is entitled to the custody of the children, unless their good clearly determines otherwise. *Uhlman v. Uhlman*, 17 Abb. N. C. 236.

Attachment or proceedings to secure a writ of *habeas corpus* are the methods of enforcing the decree for the custody of children; an order cannot be directed to the sheriff directing him to deliver them. *Nicholls v. Nicholls*, 3 Duer, 642; (See post. p. 370.)

Alimony pendente lite should not include allowance for support and maintenance of the plaintiff's stepson, a child by former marriage, nor has the court any authority to award the custody of such child to his grandfather, who is not a party to the proceeding. It seems that the court can only take infants from the custody of their parents and deliver them to strangers when invoked by petition or by application by *habeas corpus* and upon notice. *Wood v. Wood*, 61 App. Div. 96; 70 N. Y. Supp. 72.

In the case of *Monjo v. Monjo*, 53 Hun, 145; 25 N. Y. St. Repr. 150; 6 N. Y. Supp. 232; the husband procured an absolute divorce from his wife and was awarded the custody of the children. One of such children was afterwards found by the husband in the possession of the mother, who refused to give the child up. A policeman was called who arrested the mother upon direction of the husband, and conducted her to the station-house, where she remained all night. It was held that the husband was liable to the mother for damages resulting from her arrest and confinement in the station-house, and that he could have taken the child by force in a gentle manner, but he could not arrest the mother because she refused voluntarily to give up the child.

Decrees prior to amendment of statute.

The court has no power to modify a decree of absolute divorce which

awarded the custody of a child to the plaintiff, entered before the amendment of section 1771 of the Code, in 1895, for such amendment was applicable only to judgments entered after the amendment went into effect. *Matter of Haworth*, 59 App. Div. 393; 69 N. Y. Supp. 843.

Where a judgment of divorce, entered in 1899, awarded the custody of the children to the plaintiff wife, such order, after its entry, cannot be re-settled by the presiding justice by inserting therein a provision allowing the defendant to see his children, unless leave to move for such modification had been previously obtained, as required by section 1771 of the Code. *Mersereau v. Mersereau*, 51 App. Div. 461; 64 N. Y. Supp. 635.

A decree of divorce against the defendant wife may be modified so as to permit the mother to see a child four times a year in the presence of the referee, where the child is intentionally kept by its father from intercourse with its mother. *McGown v. McGown*, 22 Misc. Rep. 307; 49 N. Y. Supp. 996.

MODIFICATION OF FINAL DECREE.

Although a final decree for alimony and awarding custody of children has uniformly been held to create vested rights (see *ante*, p. 210), the statute now permits the court to modify such provisions. Leave to move for a modification must first be obtained.

When the wife remarries the statute says that the court "must" annul the provision for alimony.

These statutes are not retroactive; but for many years it has been the custom to reserve a power of amendment in the decree itself.

Code Civ. Proc. § 1771. Custody and maintenance of children, and support of plaintiff.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court

may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires for the custody, care, education and maintenance of any such child or children in such final judgment or order or orders. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained. Where an action is brought by a wife, as prescribed in article second of this chapter, and a final judgment of divorce has been rendered in her favor, the court, upon the application of the defendant on notice, and on proof of the marriage of the plaintiff after such final judgment, must by order modify such final judgment and any orders made with respect thereto, by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the plaintiff.

Code Civ. Proc. § 1759. Regulations when action for divorce brought by wife.

Where the action is brought by the wife, the following regulations apply to the proceedings:

* * * * *

2. The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in

such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

Code Civ. Proc. § 1766. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time, by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

Code Civ. Proc. § 1669. Modification of alimony, pendente lite.

Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties.

In the absence of a statute authorizing the court to modify a decree for alimony it becomes a vested right which cannot be impaired by subsequent legislation. *Livingston v. Livingston*, 173 N. Y. 377.

Section 1771 of the Code of Civil Procedure authorizing the court to modify a direction in a judicial decree of divorce respecting the support and maintenance of children and the

support of the wife applies only where the final decree contains such provision. Although the word "must" is used in said section, it is not mandatory. A final decree of divorce or separation not making provision for the maintenance of the children should reserve to the court authority to make a suitable provision in the future. *Salomon v. Salomon*, 101 App. Div. 588; 92 N. Y. Supp. 184.

In *Galusha v. Galusha*, 138 N. Y. 272, it is said that alimony need not be determined when the judgment dissolving the marriage is entered, providing the right to have it subsequently determined is reserved in the judgment. And in *Stahl v. Stahl*, 36 N. Y. St. Repr. 228; 12 N. Y. Supp. 855, it was held by the General Term of the Supreme Court "that the reservation of this right of supervision, being a part of the original decree, was designed to continue the subject to which it related, within the jurisdiction of the court, and was in effect a continuing of the power of the court over the subject and the parties, and was not, as to alimony, a final judgment."

If the decree of separation contains no provision for the payment of alimony the court cannot subsequently order such payment, but may require an allowance to be made for the care and education of the children of the marriage. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.

Under section 1759 of the Code, as it existed before the amendment of 1891, the courts had no power to change the amount of alimony allowed in a final judgment of divorce. But by the amendment to that section by chapter 728 of Laws of 1894, and chapter 891 of Laws of 1895, the court may, after final judgment, vary the direction as to alimony. But such provision is not retroactive and does not confer authority on the court to change the amount of alimony allowed in a judgment entered prior to this amendment. *Walker v. Walker*, 155 N. Y. 77.

As to a judgment of divorce entered in 1882 it was held that where the decree contained no provision reserving to the court the right to alter or modify the judgment in respect to alimony, the court has no

power to amend it by inserting such provision. *Livingston v. Livingston*, 46 App. Div. 18; 61 N. Y. Supp. 299.

The amendment of 1895 to section 1759 of the Code is not retroactive, and the court cannot modify a judgment entered before its enactment; but where a judgment of divorce entered in 1885, while containing no direction as to alimony, adjudges "that the question of alimony and the amount to be paid, if any, by the defendant * * * be reserved for the future consideration of this court," the court has jurisdiction to make an order upon notice granting alimony to the plaintiff. *Hauscheld v. Hauscheld*, 33 App. Div. 296; 53 N. Y. Supp. 831.

As the statute stood before 1895, a final decree of divorce was not susceptible of modification, and its directions as to the custody of children were unalterable. The change made by the amendment of 1895 involves a change in the policy of the law, implying that after a sentence of divorce, circumstances may require a different disposition of the offspring of the parties. *Perry v. Perry*, 17 Misc. Rep. 28; 39 N. Y. Supp. 863.

A reasonable allowance of alimony will not be modified on the ground that the husband lost his situation through the efforts of the wife. *Kunze v. Kunze*, 53 N. Y. Supp. 938.

Where the adultery of the wife is proven in an action between third parties, her husband by separating from her is freed from further contributing to her support, though he must continue to support their child. Nevertheless if he has been ordered in an action for support to pay a monthly sum for the support of the wife and child he is not excused from such payment because of the adultery, unless the order has been modified. *Ronan v. Ronan*, 32 Misc. Rep. 467; 66 N. Y. Supp. 799.

Where a husband was sued for separation and interposed a counterclaim of adultery and the jury found the wife guilty thereof, he will not be compelled to continue paying alimony *pendente lite*, where he has been incarcerated upon a criminal charge and is without means of support. *Lusk v. Lusk*, 31 Misc. Rep. 312; 65 N. Y. Supp. 401.

Remarriage of wife.

The remarriage of the former wife does not annul the decree for alimony.

The amendment to section 1771 of the Code of Civil Procedure made by chapter 339 of the Laws of 1904 requiring the court to annul a provision for alimony in case the wife remarries is not retroactive and if applied to existing decrees would be unconstitutional. But where a decree was

entered when the court under sections 1759 and 1771 had power to annul or vary a decree of alimony, it may annul alimony on the remarriage of the wife, irrespective of the amendment of 1904. *Krauss v. Krauss*, 127 App. Div. 740; 111 N. Y. Supp. 788.

The court may annul alimony where the plaintiff has remarried and the income of her second husband exceeds that of the defendant. *Comstock v. Comstock*, 49 Misc. Rep. 599; 99 N. Y. Supp. 1057.

As a court cannot annul a provision for alimony *nunc pro tunc* as of the date of the wife's remarriage, so as to cut off alimony which has already accrued, it should not limit the defendant's liability for contempt in failing to pay alimony to the date of the marriage, but he should be held for all alimony accruing to the date of the order annulling the provision for alimony. *Krauss v. Krauss*, 127 App. Div. 743; 111 N. Y. Supp. 788.

Modification of provision awarding custody of children.

As to the finality of such decree apart from the statutory provision for modification, see *ante*, p. 218.

Although a decree of separation awarding alimony requires the wife to reside in the same county as her husband in order that he may see his children, the court may modify the provision so as to permit the the wife to live in another county at certain periods of the year when it appears that by so doing, she may materially increase her income by work. *De Lamoutte v. De Lamoutte*, 129 App. Div. 283; 113 N. Y. Supp. 321.

A decree awarding the custody of children to their father will not be modified so as to allow the mother to see them while she continues to live in adultery with her paramour. *Woodhouse v. Woodhouse*, 89 App. Div. 88; 85 N. Y. Supp. 442.

Where a decree of divorce awarding the custody of a child to the wife gives the husband the privilege of seeing the child at all reasonable times, and the wife has removed with the child into another state, of which the plaintiff has also become a resident, the court will not modify the decree by requiring that the residence of the child be within the jurisdiction of the court or at such other place beyond its jurisdiction as will enable the husband to visit the child. *Newman v. Newman*, 105 App. Div. 63; 93 N. Y. Supp. 847.

Practice on application for modification of alimony.

The statute specifically makes leave of court a prerequisite to the application.

An application to alter alimony after final judgment of the court, in divorce, is a proceeding at the foot of the decree, which should be tried in the usual manner in which issues of fact are tried in an action, and should not be granted upon the affidavits and without a trial of the principal issues presented. *Wetmore v. Wetmore*, 29 App. Div. 507; 51 N. Y. Supp. 797.

A reversal by the Appellate Division of an order of the Special Term, modifying a decree of alimony, is reviewable by the Court of Appeals. *Wetmore v. Wetmore*, 162 N. Y. 503.

In *Kabatchnick v. Kabatchnick*, 26 App. Div. 292; 49 N. Y. Supp. 612, it was held that although a referee in a proceeding to reduce alimony, stated that the defendant was financially unable to pay, the Appellate Division will not interfere with a direction that he pay a certain sum per week where it appears that the fees paid his attorney and the costs of printing papers on appeal, etc., amount to enough to have paid the alimony directed to be paid from the granting of judgment to present time.

ENFORCING PAYMENT OF ALIMONY.

Payment of alimony may be enforced in four ways:—
 (1) The husband may be required to give security. (2) His personal property and the income of his real property

may be sequestered by means of a receiver. (3) He may be committed for contempt and fined. (4) The wife may bring a suit in equity in aid of the decree where the husband has removed beyond the jurisdiction leaving equitable assets here.

Where a decree or order for the payment of alimony or support of children has been entered in an action brought in this state, or in an action on the judgment of a foreign state granted on the ground of adultery, the court may require the husband to give security for payment. If he fail to give security, or to pay, his property may be sequestered, and a receiver appointed.

Code Civ. Proc. § 1662. Support, maintenance, etc., of wife and children. Sequestration.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, or a judgment for divorce or separation rendered in another state, upon the ground of adultery upon which an action has been brought in this state, and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in section seventeen hundred and sixty-nine of this act; the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

Security.

Whether or no a husband shall be required to give security for the payment of alimony is held to be in the discretion of the court under section 1772 of the Code of Civil Procedure. *Maney v. Maney*, 119 App. Div. 765; 104 N. Y. Supp. 541.

Under the law of this state a husband's obligation to pay alimony ceases at his death, and hence, where a husband is under section 1772 of the Code of Civil Procedure required to secure the payment of alimony by a mortgage upon land, the lien of the mortgage terminates at his death. *Wilson v. Hinman*, 182 N. Y. 408.

Although a husband who has failed to pay alimony may be punished for contempt, he cannot be held in contempt for failing to secure the payment by the execution of an undertaking as ordered. *People ex rel. Ready v. Walsh*, 132 App. Div. 462; 116 N. Y. Supp. 839.

Foreign decree awarding alimony, enforcement.

The court of another state having, by the law of that state, power to amend a decree of divorce previously rendered therein against a resident of this state by inserting provisions for alimony, acquires jurisdiction to render a decree for the payment of the alimony where he is served with notice of motion therefor in this state, makes an appearance and contests the motion, even though the decree of divorce was invalid for want of jurisdiction. Further, the provisions of the Federal Constitution requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state, require the courts of this state to give such decree full credit and effect as a judicial debt of record against the defendant for the amount fixed at the time the decree was rendered. But this state will not permit the plaintiff to invoke equitable remedies in aid of a judgment recovered on such decree, for they are available only in aid

of decrees of divorce rendered in this state. It was further held that a provision in such foreign decree for future alimony, subject to the discretion of the foreign court, lacks that conclusiveness which requires courts of this state to enforce it. Held, further, that the provision of such foreign decree allowing the enforcement of payment by equitable remedies of receivership and injunction cannot be enforced in this state; being in the nature of an execution they operate only upon the defendant as he or his property may be found within the jurisdiction of the foreign court. *Lynde v. Lynde*, 162 N. Y. 405.

A foreign decree for alimony rendered in an action in which the court had jurisdiction of a defendant in this state must be recognized as valid by our courts, and entitles the wife to maintain an action on the foreign decree to recover installments of alimony due. *Moore v. Moore*, 40 Misc. Rep. 162; 81 N. Y. Supp. 729.

An action may be maintained in this state to recover installments of alimony awarded by a foreign judgment of divorce as they fall due, but there is no principle, of equity or comity, by which the defendant's property can be sequestered, but he can be compelled to give security in this state for future alimony awarded by a foreign judgment. *Wood v. Wood*, 31 Abb. N. C. 235.

In *Sistare v. Sistare*, 218 U. S. 1, the Supreme Court of the United States has recently held that, as to installments past due and unpaid, the courts of one state must enforce a decree of a sister state for future alimony, provided that the decree has not been modified prior to the maturity of such installments or that the court which rendered the decree had no such discretion in the enforcement thereof that it could annul or modify it even as to overdue and unsatisfied installments. The court says: "First. That generally speaking, where a decree is rendered for alimony and is made payable in future installments, the right to such installments

becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments. Second. That this general rule, however, does not obtain where by the law of the state in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even though no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due."

In *Patton v. Patton*, 123 N. Y. Supp. 329, the Appellate Term of this state has rendered a decision harmonious with the rule laid down in *Sistare v. Sistare*. In the *Patton* case, an action was brought to recover unpaid alimony awarded by a decree of the Supreme Court of the District of Columbia, and the court held that, in the absence of proof that such a decree is subject to modification, an action based thereon may be properly maintained in the courts of this state.

Sequestration of husband's property; receivers.

A receiver of a husband's real estate cannot be appointed under section 1772 of the Code of Civil Procedure where he has paid alimony as ordered by an interlocutory judgment of divorce and has given security. *Logan v. Logan*, 125 App. Div. 724; 110 N. Y. Supp. 174.

The property of the husband should not be sequestered unless he neglects or refuses to give security for the payment of the alimony, or upon default of the husband and his surety after security is given. *Davis v. Davis*, 1 Hun, 444. But, in the case of *Percival v. Percival*, 14 N. Y. St. Repr. 255, it was held that the court may order a receiver of the husband's property, although the judgment did not

require security for the payment of alimony, and the husband had not refused to give security therefor.

In the case of *Forrest v. Forrest*, 9 Bosw. 686, it was held that the court could not sequester a husband's property until it had asked him to give security to pay the allowance.

But in *Park v. Park*, 80 N. Y. 156, where, upon the return of the attachment against the defendant for an alleged contempt in disobeying the provisions contained in the judgment of divorce, which required him to pay alimony, and to give security for the payment thereof, and upon motion to vacate the attachment the court adjudged him to be in contempt, and ordered him to pay a fine, to give security for a specified amount for future alimony, and to stand committed until compliance with the order, it was held that the whole matter was before the court, and the court had jurisdiction to grant such relief.

A receiver appointed in matrimonial actions must give a bond as required by section 715 of the Code of Civil Procedure, but where the order does not require him to give a bond it is not void, but merely avoidable, and hence a husband who has not appealed from the order cannot refuse to deliver his property to the receiver. *Matter of Spies*, 92 App. Div. 175; 86 N. Y. Supp. 1043.

Where a judgment of separation is void, a subsequent order appointing a receiver for the husband on his refusal to pay alimony will be reversed. *Boyer v. Boyer*, 129 App. Div. 647; 114 N. Y. Supp. 15.

A wife cannot appeal from an order sequestering her husband's property for failure to pay alimony as she is not aggrieved thereby. *Conklin v. Conklin*, 125 App. Div. 278; 109 N. Y. Supp. 187.

The proceeding to compel the application of the rents and profits of the real estate of the husband whose property has been sequestered in divorce proceedings should be brought by the wife. *Foster v. Townshend*, 68 N. Y. 203.

In *Foster v. Townshend*, 68 N. Y. 203, it was held that the receiver, appointed under this section to sequester the personal property, and the rents and profits of the real estate of the husband, acquires no title to the real estate, but simply is entitled to possession as against

the defendant, and all claiming under him, and so long as his rights are not questioned, and there is no interference therewith either actual or threatened, he has no concern with the title, and cannot maintain an action to determine the validity of transfers thereof made by the defendant.

The case of *Donnelly v. West*, 17 Hun, 564, comments upon the case of *Foster v. Townshend*, and says that, "that action was brought to set aside a transfer made after the appointment of the sequestrator or receiver. In that case the right of the third person was subsequent and subordinate to the right of the receiver, and was never in fact opposed to the possession and proceedings of the receiver. Upon that ground the Court of Appeals reversed the decision of the court below, but the right of the receiver to bring the action where the adverse right was obtained before the appointment of the receiver, and was set up to prevent the proceeding of the receiver in the execution of the mandate of the court, was fully recognized if not conceded." In the case of *Donnelly v. West*, the complaint alleged that the transfer was made previous to the appointment of the receiver, and that because of such transfer the receiver was unable to obtain any personal property or to collect any of the rents and profits of the real estate. Such a transfer may be set aside, if fraudulent, in an action brought by the receiver in his own name, but the wife cannot look to her husband to advance moneys to enable her to resort to the remedies given by this section, if he does not pay the money awarded her. *McQuien v. McQuien*, 61 How. Pr. 280.

The income of a trust fund created for the benefit of testator's son cannot be applied to the payment of alimony after an absolute divorce, where the plaintiff marries again and her husband's ability to support her is unquestioned. *Wetmore v. Wetmore*, 162 N. Y. 503.

Where an allowance for alimony is made to the wife to be paid by her husband, a trustee, required by the will of his testator to pay over annually, to the husband the income of the trust estate, may be ordered by the court to pay to the wife the amount of such income equal to the alimony awarded to her. *Thompson v. Thompson*, 52 Hun, 456; 24 N. Y. St. Repr. 108; 5 N. Y. Supp. 604.

Suit in aid of decree for alimony.

Where a wife is awarded alimony *pendente lite* in an action for separation and the husband removes beyond the jurisdiction of the court, leaving no property which may be taken upon execution or sequestration, the wife may maintain an equitable action against him and his father's executors to reach the surplus of the beneficial income given to

him in his father's will. *McGlynn v. McGlynn*, 37 Misc. Rep. 12; 74 N. Y. Supp. 744.

Where the property of a husband has been sequestered to pay alimony and a receiver appointed, the wife may maintain a separate action in aid of such proceeding to restrain the executors from paying her husband a legacy accruing after the sequestration, and to compel them to pay it to the receiver. Such receiver cannot sue without leave. Thus, where he joined with the wife in an action without leave the complaint is demurrable as to him. *Garden v. Garden*, 34 Misc. Rep. 97; 69 N. Y. Supp. 481.

As to foreign decree for alimony see ante. p. 227.

CONTEMPT PROCEEDINGS.

A husband who fails to pay alimony, whether awarded pendente lite or by final decree, may be punished for contempt, if it appear that the remedy by requiring security, or by sequestration of his property would be ineffectual.

The husband must make the payments ordered, until the decree or order is modified or set aside. Poverty is no defense.

Code Civ. Proc. § 1773. When payment of alimony enforced by punishment for contempt.

Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court, other than a criminal contempt. Such an order to show cause may also

be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

A motion to punish a husband for contempt for failure to pay alimony will be denied if the wife fails to show that a sequestration of his property would be ineffectual. *Conklin v. Conklin*, 125 App. Div. 280; 109 N. Y. Supp. 189.

Alimony accruing between the entry of a final decree and the service of a copy thereof may be enforced by contempt proceedings if the defendant has given no security and has no property which can be sequestered. *Gunn v. Gunn*, 120 App. Div. 353; 105 N. Y. Supp. 340.

Where the defendant refuses to comply with the order directing payment of alimony, the court may act directly by proceeding to punish for contempt, if it is shown affirmatively that payment cannot be enforced by requiring security or sequestering the defendant's property, but in all cases it should be shown that the amount cannot be realized by sequestration or by a receiver before punishment by a fine or imprisonment can be inflicted. *Brisbane v. Brisbane*, 34 Hun, 339.

A husband can be imprisoned for non-payment of alimony, when, after the court determines that the sequestration or required security, would not result in getting the money. In general, the husband should have notice of the application to commit him; but the court has power to commit him without notice if it is satisfied that the sequestration and security would be useless. *Isaacs v. Isaacs*, 61 How. Pr. 369.

A husband ordered to pay alimony must obey the order until it is modified, set aside or reversed unless he has obtained a stay. *Schweig v. Schweig*, 122 App. Div. 787; 107 N. Y. Supp. 905.

A husband will be held in contempt for failing to pay alimony after

demand although he has moved to set aside the judgment which was taken by default. *Knauer v. Knauer*, 121 App. Div. 748; 106 N. Y. Supp. 491.

A husband adjudged to be in contempt for failure to pay alimony *pendente lite* is liable for the alimony although the complaint be subsequently dismissed. *Shepard v. Shepard*, 99 App. Div. 308; 90 N. Y. Supp. 982.

A husband who has been ordered to pay alimony *pendente lite* cannot justify a refusal to pay upon the ground that the plaintiff did not permit him access to their children as required by the order. *Schweig v. Schweig*, 122 App. Div. 787; 107 N. Y. Supp. 905.

Poverty no defense.

Poverty is no defense to a motion for an order adjudging a husband in contempt for failing to pay alimony. *Compton v. Compton*, 125 App. Div. 859; 110 N. Y. Supp. 775.

The inability of the defendant to pay is no defense to the application to commit him. *Strobridge v. Strobridge*, 21 Hun, 288; *Ryckman v. Ryckman*, 34 Hun, 235. But his poverty is ground for a motion for his discharge from imprisonment if he has not continued his adulterous relations. *Ryckman v. Ryckman*, 34 Hun, 235. *Matter of Ryckman*, 39 Hun, 646; *Ryer v. Ryer*, 33 Hun, 116.

Inability to pay alimony is no excuse for failure to pay in contempt proceedings. To procure relief the husband should move to be released from imprisonment. *Young v. Young*, 35 Misc. Rep. 335; 71 N. Y. Supp. 944.

In *Wetmore v. Wetmore*, 34 Misc. Rep. 640; 70 N. Y. Supp. 604, *affd.* 72 App. Div. 620; 76 N. Y. Supp. 1037, a husband who had persistently refused to pay alimony, and who had never given the bond required in sequestration proceedings, and had remained continuously without the jurisdiction of the court, was refused a motion that the judgment in divorce and sequestration be vacated, and that he be purged of contempt upon showing a willingness to pay back alimony. The court said his conduct had been such that it would refuse him any relief as a favor, and that he was not entitled to any as a matter of right.

When husband will not be punished; demand prerequisites.

A husband cannot be held in contempt for failing to pay

alimony in the absence of a demand for the amount due. *Compton v. Compton*, 125 App. Div. 859; 110 N. Y. Supp. 775.

A husband cannot be punished for contempt in failing to pay alimony in the absence of a demand made by a person authorized to receive payment. A demand by the managing clerk of the wife's attorney is insufficient in the absence of special authority, as the authority of the attorney ceased on entry of judgment. *Conklin v. Conklin*, 113 App. Div. 743; 99 N. Y. Supp. 310.

A husband cannot be punished for contempt in failing to pay alimony *pendente lite* unless a demand has been made upon him and the order to show cause why he should not be punished has been personally served. Service of the order upon his attorney is insufficient. *Goldie v. Goldie*, 77 App. Div. 12; 79 N. Y. Supp. 268.

A defendant who pays alimony after having been arrested under a void order adjudging him in contempt pays under duress and is not estopped from moving to vacate the order. *Stewart v. Stewart*, 127 App. Div. 724; 111 N. Y. Supp. 734.

Where a plaintiff is enjoined from enforcing an order for alimony the defendant cannot be adjudged in contempt for failure to pay. *Comstock v. Comstock*, 49 Misc. Rep. 599; 99 N. Y. Supp. 1057.

A person who endeavors to induce a wife to withdraw an action for separation by the offer of money is not guilty of contempt of court under subdivision 4 of section 14 of the Code of Civil Procedure. *Herrmann v. Herrmann*, 82 App. Div. 437; 81 N. Y. Supp. 811.

Failure to pay counsel fees.

Where, in an action for separation, brought by a wife against her husband, the final judgment directed the defendant to pay to plaintiff's attorney a fixed sum for her costs and counsel fees, the failure of the defendant to make such payment cannot be treated as a contempt, authorizing his commitment until he shall pay such amount. *Jacquin v. Jacquin*, 36 Hun, 378; *Weill v. Weill*, 18 Civ. Proc. Rep. 241, 10 N. Y. Supp. 627.

Before a husband who, in an action for divorce, has been directed to pay alimony and counsel fees, can be punished for contempt in failing so to do, it must appear to the court that the payment cannot be enforced by execution, sequestration or resorting to security, and where the security has not been ordered, and it does not appear that payment can be enforced by sequestration proceedings or execution,

an order of committal should be reversed. *Whitney v. Whitney*, 33 N. Y. St. Repr. 704; 11 N. Y. Supp. 582; 19 Civ. Proc. Rep. 265.

Agreement of wife to accept smaller sum.

Where after a decree of divorce requiring the husband to pay alimony, he agreed with his divorced wife to pay her a cash sum and alimony at a rate less than that required by the decree, she cannot enforce the contract by contempt proceedings though she may enforce the decree in that manner unless the sum paid under the contract exceeds the alimony. *Clark v. Clark*, 130 App. Div. 610; 115 N. Y. Supp. 500; appeal dismissed 195 N. Y. 612.

The court will not adjudge a husband in contempt for failure to pay alimony as directed by a decree where his wife agreed to accept a smaller sum on account and a reference is pending to determine whether the husband is able to pay the alimony awarded by the court. *Goodsell v. Goodsell*, 94 App. Div. 443, 95 N. Y. Supp. 242.

Practice in contempt proceedings—what statute governs service; demand; fine, etc.

The enforcement of the payment of alimony is governed exclusively by sections 1772 and 1773 of the Code of Civil Procedure; the other provisions of the Code relating to punishment for a failure to obey mandates of the court have no application. *People ex rel. Ready v. Walsh*, 132 App. Div. 462; 116 N. Y. Supp. 839.

The remedy of a wife where her husband refused to pay alimony must be had under sections 1772 and 1773 of the Code of Civil Procedure. She cannot issue execution and examine the defendant in supplementary proceedings. *Weber v. Weber*, 93 App. Div. 149; 87 N. Y. Supp. 519.

The enforcement of the payment of alimony by contempt proceedings is governed by section 1773 of the Code of Civil Procedure not by section 1241. *Stanley v. Stanley*, 116 App. Div. 544; 101 N. Y. Supp. 725.

Section 1773 of the Code of Civil Procedure regulating proceedings to punish a defendant for contempt for failure to pay alimony is exclusive and a plaintiff should proceed thereunder rather than under section 2268 relating to contempts in general. Hence, the proceeding must originate on an order to show cause. *Stewart v. Stewart*, 127 App. Div. 724; 111 N. Y. Supp. 734.

To warrant an order to show cause why a defendant should not be punished for contempt in not paying alimony, an affidavit on information and belief that he has no property, except his earnings, the disposition of which the deponent is ignorant of, that he cannot give security, and that an order for security or sequestration would be ineffectual, would be sufficient. *Rahl v. Rahl*, 14 Week. Dig. 560.

An application to punish a party for contempt in failing to obey an order directing him to pay alimony, cannot be made upon a mere notice of motion, but the party must be brought before the court either by an order to show cause or a warrant of attachment. *Sanford v. Sanford*, 9 Civ. Proc. Rep. 289.

Service of process.

In order to adjudge a husband guilty of contempt for failure to pay alimony, the court must acquire jurisdiction over his person. Where he resides in a foreign state, service of the order to show cause upon his attorney who represented him in the divorce action is not sufficient as it is presumed that the authority of such attorney ended on the entry of final judgment. *Keller v. Keller*, 100 App. Div. 325; 91 N. Y. Supp. 528.

Where an order for alimony and counsel fees *pendente lite* has been served within this state and after being vacated on the husband's motion, has been ordered to be filed *nunc pro tunc* in the proper county, the second order and an order to show cause why the defendant should not be punished for contempt may be served without the state. *Harney v. Harney*, 110 App. Div. 20; 96 N. Y. Supp. 905.

An order to punish a husband for contempt in failing to pay alimony may be served upon his attorney in the same manner as other orders in the action. *Carr v. Carr*, 64 Misc. Rep. 436; 118 N. Y. Supp. 625.

Demand for payment.

A demand made upon a husband by the wife's attorney for the payment of alimony *pendente lite* without exhibiting any authority to make the demand or receive alimony is not sufficient basis for contempt proceedings. *Kalmanowitz v. Kalmanowitz*, 108 App. Div. 296; 95 N. Y. Supp. 627. See *ests*, p. 235.

Necessary findings.

In adjudging a defendant in default for failing to pay alimony, the court should find that his failure tended to and did defeat, impair, impede and prejudice the rights of the wife. *Krauss v. Krauss*, 127 App. Div. 743; 111 N. Y. Supp. 790.

An order adjudging a husband in contempt for failing to pay ali-

mony *pendente lite* will be reversed in the absence of a finding that the failure to pay was calculated to or actually did defeat, impede or prejudice the rights or remedies of the plaintiff. *Schweig v. Schweig*, 122 App. Div. 787; 107 N. Y. Supp. 906.

An order committing a husband for contempt in refusing to pay alimony need not state whether he has any real or personal property, or that payment cannot be enforced by sequestration of such property. *Distasio v. Distasio*, 26 Misc. Rep. 491; 57 N. Y. Supp. 672.

Amount of fine.

In fining a husband for failure to pay alimony the amount should be limited to the sum due at the time payment was demanded. *Woolworth v. Woolworth*, 115 App. Div. 405; 100 N. Y. Supp. 865.

Imprisonment; discharge.

A person who has been committed for contempt for failure to pay alimony *pendente lite* and has been released after serving the term of imprisonment prescribed by section 111 of the Code of Civil Procedure cannot be rearrested for a failure to pay alimony subsequently accruing. *Maran v. Maran*, 137 App. Div. 348; 122 N. Y. Supp. 9.

Section 111 of the Code, which limits the duration of imprisonment under civil process, does not preclude the court from committing a husband to prison for failure to pay permanent alimony awarded in a final judgment, although he has previously served three months under a judgment for contempt for failing to pay alimony *pendente lite*. *Reese v. Reese*, 46 App. Div. 156; 61 N. Y. Supp. 760.

A defendant committed for a failure to pay alimony and counsel fees to the plaintiff is not entitled to the jail liberties. *In re Clarke*, 20 Hun, 551; *Strobridge v. Strobridge*, 21 Hun, 288; *Allen v. Allen*, 58 How. Pr. 381.

CHAPTER IX.

FOREIGN DIVORCES; CONFLICT OF LAWS.

The marital relation, as distinguished from the contract by which the relation is assumed, is a status. Each state may determine the marital status of its own citizens. Hence when the courts of one state assume to render a decree of divorce against the citizen of another state, there may arise a conflict of laws. And as the federal constitution requires each state of the union to give due faith and credit to the public acts and judicial proceedings of every other state (art. IV, § 1), the conflict of laws becomes complicated. One who has remarried after a foreign divorce may, perchance, be a bigamist in one state and a lawfully wedded spouse in another state (*People v. Baker*, 76 N. Y. 78); and this situation will doubtless continue in this "indestructible Union, composed of indestructible States" until the matter be put within the federal jurisdiction.

The English law is similar, but cannot lead to similar complications.

"It is now also clearly recognized as the law of England that the English courts will not recognize a divorce purporting to be made by a foreign tribunal with regard to persons domiciled in England." 27 Enc. Brit. 479.

In this country the conflict between state rights on the one hand, and the constitutional provision on the other, has been solved, so far as possible, by reducing it to a jurisdictional question.

The federal courts have no jurisdiction save as the inter-

pretation of the constitution may be involved. (See *ante*, p. 183.

One state may refuse to recognize the validity of a decree of divorce rendered against one of its own citizens by the courts of another state on grounds not recognized as sufficient by the first state, where there was constructive service of process and the defendant did not appear in the action. The court may inquire into the bona fides of the plaintiff's foreign domicile.

Where after a matrimonial domicile in this state the husband left his wife, acquired in good faith a domicile in another state and there pursuant to its laws and on constructive service of summons obtained a decree of divorce against his wife, who remained domiciled in this state and never appeared in the action, the courts of this state are not obliged to recognize the validity of the foreign divorce under the full faith and credit clause of the constitution. *Haddock v. Haddock*, 201 U. S. 562.

A decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party without violating the full faith and credit clause of the Federal Constitution. *German Savings Society v. Dormitzer*, 192 U. S. 125, Citing *Andrews v. Andrews*, 188 U. S. 14.

While the courts of this state are required to give full faith and credit to the decrees of the courts of our sister states, we have the right to inquire as to whether such courts had jurisdiction of the person and subject matter and if it be found that they had not obtained jurisdiction, then their judgment or decrees become of no force or effect. *Olmsted v. Olmsted*, 190 N. Y. 458.

A state may forbid the enforcement of a decree of divorce within its borders where it is obtained by one of its own citizens who went into another state to procure a divorce

while retaining his original domicile. *Andrews v. Andrews*, 188 U. S. 14.

A decree of absolute divorce obtained in a state in which neither party is domiciled upon service by publication is entitled to no faith and credit in the state in which the defendant is served. *Bell v. Bell*, 181 U. S. 175.

A decree of absolute divorce obtained in a state in which neither of the parties is domiciled upon service by publication on the defendant in another state, is entitled to no faith and credit in the latter state. Where the jurisdiction of state courts to render divorce depends upon a domicile of the plaintiff acquired in good faith a decree is void if the domicile was not *bona fide*. *Streitwolf v. Streitwolf*, 181 U. S. 197.

The marriage relation is not a *res* within the state of the party invoking the jurisdiction of the court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another state, by the subsequent service, or actual notice given without the jurisdiction of the court where the action is pending. A judgment, therefore, of divorce rendered in another state against a resident of this state, where there has been no personal service within the state rendering it, and no personal appearance by the defendant in the action, is inoperative and void in this state. A state may adjudge the status of its citizens towards a non-resident, and so long as the operation of such a judgment is kept within its own confines, other states must acquiesce, but it has no effect beyond the limit of the state. *Williams v. Williams*, 130 N. Y. 193; *De Meli v. Meli*, 120 N. Y. 485; *Rigney v. Rigney*, 127 N. Y. 408; *Bell v. Bell*, 4 App. Div. 527; 40 N. Y. Supp. 443; *affd.* 157 N. Y. 719.

In the case of *Hunt v. Hunt*, 72 N. Y. 217, it was held that the jurisdiction of the court of another state, in which a judgment has been rendered, is always open to inquiry in the courts of this state, and the judgment may be also questioned collaterally for fraud. To authorize a disregard of the judgment because of fraud there must be fraudulent allegations and representations, designed and intended to mislead, with knowledge of falsity resulting in damaging deception. The court, in the above case, in discussing this question uses the following language: "There are numerous authorities, and the plaintiff has cited some of them, to the effect that a judgment of another state got against a resident of this state, who has never been a citizen of that, without personal service of process or voluntary appearance, is not a valid judgment, and may be inquired into in our courts, and on such facts appearing may be disregarded as having been rendered

without jurisdiction. We have not seen a decision which so holds, where the defendant was a citizen of the other state, and the court thereof proceeded upon a substituted service in accordance with the laws of that state. *Borden v. Fitch*, 15 Johns. Rep. 121, which is the leading case in this state, rests upon the fact that the defendant, in the judgment there impugned, had never been domiciled in the state where the judgment was rendered. It would be tedious to name and review all of the cases in this state. In the earlier of them, there was not harmony with those of the federal courts, and a disposition was manifested to treat the judgment of the court of another state as like those of the courts of a foreign country. I think that the result of the decisions in this state, at this time, is this: that when the courts of another state have jurisdiction of the subject-matter and of the person, they are to be credited collaterally; that jurisdiction of the subject-matter is to be tested by the power conferred by the constitution and the laws of the other state; and that as to the jurisdiction of the person they go no farther against it than that if the defendant is a domiciled citizen of this state, jurisdiction of him by the courts of another state is not acquired, save by personal service of process or his voluntary appearance."

It would seem, then, that where divorce is secured in another state against one, who at the time it was rendered, and pending the action, was domiciled in this state, and who was not served with process, and did not appear, is inoperative and void as to the defendant. *Cross v. Cross*, 108 N. Y. 628; *O'Dea v. O'Dea*, 101 N. Y. 23, *People v. Baker*, 76 N. Y. 78; *Williams v. Williams*; 25 N. Y. St. Repr. 183; 6 N. Y. Supp. 645, *affd.* 130 N. Y. 193; *Kimball v. Kimball*, 165 N. Y. 62.

Our courts will not recognize the validity of a foreign divorce obtained against a resident of this state for desertion where the process was served by publication but without personal service within or without the state, and the defendant had no notice of the action, until after the decree had been entered. *Ackerman v. Ackerman*, 123 App. Div. 750; 108 N. Y. Supp. 534.

Where a wife leaving her husband in his state acquired a foreign residence and there obtained a decree of absolute divorce without personal service upon the husband and without his appearing in the action, the decree is void and is no defense to a subsequent action for divorce brought by the husband upon the ground that the wife in remarrying is living in adultery. *Ranson v. Ranson*, 54 Misc. Rep. 410; 104 N. Y. Supp. 198; *affd.* on opinion below, 125 App. Div. 915; 109 N. Y. Supp. 1143.

In order to attack the validity of a foreign divorce obtained on grounds other than adultery where the process was served by publication it must be shown that at the time of the foreign decree the defendant was a *bona fide* resident of this state even though in a prior

action for separation it was adjudged that he was a resident. *Percival v. Percival*, 106 App. Div. 111; 94 N. Y. Supp. 909; *affd.* without opinion, 186 N. Y. 587.

Where a husband deserts his wife and children in this state without support and obtains a judgment of divorce against her in another state upon constructive service of process, the judgment is invalid and the wife is entitled to dower in lands owned by the husband in this state. *Halter v. Van Camp*, 64 Misc. Rep. 366; 118 N. Y. Supp. 545.

A divorce granted in another state dissolving a marriage contract in this state in favor of the husband, temporarily residing there, upon substituted service upon his wife, who resided in this state, and for an alleged cause which did not exist in fact, is invalid and inoperative as against the wife. *Mellen v. Mellen*, 10 Abb. N. C. 329.

In the case of *The People v. Commissioners of Charities, etc.*, 13 Hun, 414, it appeared that the husband left the wife, stating to her that he was going into business in Cincinnati; but immediately thereafter he sued in Utah for a divorce, alleging that he intended to become a resident of that territory. No service was made on the wife other than by publication in Utah, and she had no knowledge of the proceedings. It was held that the proceedings were void, and that judgment for divorce was not valid as against the wife.

Where the statute in another state authorizing a service of the summons by publication requiring affidavits of certain facts, and it appears that such affidavits in an action to procure a divorce in that state were false and fraudulent, the service of the summons therein will be treated as a nullity by the courts of the state, and a judgment obtained in such an action is invalid. *Stanton v. Crosby*, 9 Hun, 370.

Where it appeared that, in an action for divorce in Indiana, neither of the parties in fact resided, at the time of bringing the action, in that state, and there had been no personal service of process upon the defendant therein, nor any authorized appearance for her, the judgment obtained in such an action is invalid in this state, although the Indiana record recites the residence of the plaintiff in good faith for one year within the state of Indiana, and shows an appearance for the defendant by one purporting to be an attorney at law in that state. *Kerr v. Kerr*, 41 N. Y. 272.

The following cases may be cited as establishing the above principle: *Jackson v. Jackson*, 1 Johns. 424; *Borden v. Fitch*, 15 Johns. 121; *Bradshaw v. Heath*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 640; *McGiffert v. McGiffert*, 31 Barb. 69.

In the case of *Hoffman v. Hoffman*, 46 N. Y. 30, it was held that a divorce obtained in another state, without service of process upon the defendant, and where both parties at the commencement of the suit, and during its pendency, resided in this state, is invalid. The record

of such a decree is not conclusive upon the courts of this state as to the question of jurisdiction, but the facts alleged therein may all be shown to be untrue.

As the right to refuse to recognize the validity of a foreign divorce so obtained rests upon a defect in obtaining jurisdiction, its validity cannot be questioned where the defendant appeared.

Where a resident of this state sued for divorce and served by publication makes a general appearance in the action, the decree is binding here. Voluntary appearance is equivalent to the personal service of process within the jurisdiction, both at common law and under the Code of Civil Procedure unless the appearance be special for the purpose of questioning the jurisdiction. *Strauss v. Strauss*, 122 App. Div. 729; 107 N. Y. Supp. 842.

Where a foreign court has jurisdiction of an action for divorce and the defendant, a resident of this state, personally appears in the action, the decree is conclusive and binding upon the courts of this state so long as it remains in force. It cannot be attacked collaterally here.

It seems, that if the wife who procured the foreign divorce is entitled under the laws of our state to have it set aside, she must ask that relief in the state in which the judgment was rendered. *Guggenheim v. Wahl*, 138 App. Div. 269; 122 N. Y. Supp. 941.

In *Kinnier v. Kinnier*, 45 N. Y. 535, it is held that, in questioning the validity in this state of the decree of a court of competent jurisdiction of a sister state, the status of the parties within that state, and the question whether they or any of them were residents of that state so as to give them a standing in court there for the purpose of such decree, are to be determined by that court, and their determination thereupon cannot be questioned collaterally in our own. In this case it appears that a former husband of the defendant, a resident of Massachusetts, went to Illinois expressly to procure his divorce from her, commenced an action there in the proper court for the purpose, and she having appeared and permitted by collusion with him, a decree of divorce to be

granted against her, subsequently married the plaintiff here, it was held, that in an action brought in this state to annul the last marriage on the ground of the defendant's former marriage being still in force, a complaint stating such facts was insufficient, and a demurrer thereto must stand.

Although a foreign divorce be void as against a defendant domiciled here the plaintiff is estopped from questioning its validity.

Although a foreign divorce obtained against a resident of this state be invalid because of lack of jurisdiction, the party who obtained it cannot assert its invalidity in a collateral action. See *Starbuck v. Starbuck*, 173 N. Y. 503.

Where a wife had separated from her husband and had obtained an absolute divorce from him by a foreign judgment, not recognized in this state, it was held that she could not impeach the validity of the decree of divorce obtained by her, and claim the right to administer the estate of her former husband as his widow; having submitted to the jurisdiction of that court she could not thereafter be heard to question it. *Matter of Swales*, 60 App. Div. 599; 70 N. Y. Supp. 220; *affd.*, 172 N. Y. 651.

A decree of divorce obtained by a wife in a foreign state although not valid in this state bars her claim to dower in lands acquired by her former husband after the decree as she cannot impeach a judgment obtained by her in her own favor. *Starbuck v. Starbuck*, 173 N. Y. 503.

Where a wife having procured a decree of separation in this state went into a foreign state and procured an absolute divorce on the ground of cruelty without personal service and then remarried she is bound by the judgment and cannot claim dower in lands owned by her husband prior or subsequent to the divorce. *Volke v. Platt*, 48 Misc. Rep. 273; 96 N. Y. Supp. 725.

A foreign decree of divorce obtained by a wife fixes her status and the husband cannot be charged with necessities subsequently furnished to her. This is true although the court which granted the divorce subsequently set it aside on the wife's application if it does not appear

that the court obtained jurisdiction over the husband. *Buxbaum v. Buxbaum*, 48 Misc. Rep. 396; 95 N. Y. Supp. 539.

A husband who leaves his wife in this state and procures a foreign divorce may not impeach the decree upon the ground that the foreign court had no jurisdiction in a subsequent action brought by his wife in this state for non-support. *People ex rel. Shrady v. Shrady*, 47 Misc. Rep. 333, 95 N. Y. Supp. 991.

One who has invoked the jurisdiction of a foreign state to obtain divorce cannot afterwards allege the nullity of the decree granted. *Lacey v. Lacey*, 38 Misc. Rep. 196; 77 N. Y. Supp. 235.

But one state must recognize the validity of a divorce granted by the courts of another state on constructive service of process and without appearance by the defendant, where the foreign jurisdiction was the original domicile of the parties, although the defendant has acquired another domicile.

Where a wife having a matrimonial domicile with her husband in another state deserts him and comes to this state, a decree of absolute divorce rendered by the foreign state upon the ground of abandonment on service by publication is valid and bars a subsequent action for a divorce brought by the wife in this state. *Atherton v. Atherton*, 181 U. S. 155.

This important decision involved a construction of the clause of the Federal Constitution providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." But the court is careful to point out that the case "does not involve the validity of a divorce granted on constructive service by the courts of a state in which only one of the parties ever had a domicile nor the question to what extent the good faith of a domicile may be afterwards inquired into."

The facts in *Atherton v. Atherton* were as follows: the parties were married in the state of New York, but subsequently obtained a matrimonial domicile in Kentucky. Thereafter the wife left her husband and returned to her mother in this state. The husband filed a petition for abso-

lute divorce from the bonds of matrimony in the courts of Kentucky, basing the action upon abandonment, which was there a cause of absolute divorce. The wife, resident in New York, was served without the state according to the practice laid down by the Kentucky statutes. Held, that the decree rendered in such action was binding, and was a bar to the wife's petition for a divorce in New York. Peckham, J., with whom the chief justice concurred, dissented. The contrary had been held by the Court of Appeals in the same case, *Atherton v. Atherton*, 155 N. Y. 129.

If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile, and in the absence of any proof of fraud or misconduct on his part a divorce obtained by him in the state of his domicile after reasonable notice to her either by personal service or by publication in accordance with its laws is valid although she never in fact resided in that state. *Cheely v. Clayton*, 110 U. S. 701.

"The courts of the state of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws for any cause allowed by those laws, without regard to the place of the marriage or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere."

Where a wife without cause left her matrimonial domicile in this state and the husband having acquired a foreign domicile in good faith, obtained a judgment of divorce upon the ground of desertion in which action the summons was served upon the wife by publication, the court acquired jurisdiction and its decree is entitled to full territorial effect under the full faith and credit clause of the constitution. *North v. North*, 47 Misc. Rep. 180; 93 N. Y. Supp. 512; *affd.* without opinion; 111 App. Div. 921; 96 N. Y. Supp. 1138; appeal dismissed 192 N. Y. 563.

Where a wife leaves the matrimonial domicile in another state and comes to this state, our courts will recognize the validity of a foreign divorce obtained by the husband on service by publication pursuant to the laws of the foreign state. *Hammond v. Hammond*, 103 App. Div. 437; 93 N. Y. Supp. 1.

In an action brought to annul a marriage on the ground that the

defendant had a husband living at the time of her marriage to the plaintiff, it appeared that the defendant was married, and afterwards secured a divorce in another state; in order to invalidate a judgment of divorce so secured it must be shown that the defendant was not at that time a resident of the state in which the divorce was granted. The burden of proof in such a case is upon the plaintiff. *Campbell v. Campbell*, 90 Hun, 233; 69 N. Y. St. Repr. 634; 35 N. Y. Supp. 280.

It is well settled that where both of the parties to a marriage contract are *bona fide* citizens of and domiciled in any state, the courts of that state have power to divorce them. Such a divorce is valid not only in the state where it is granted, but in every other, and the jurisdiction of the person of the defendant in an action for a divorce may be acquired by a court of the state in which he is a domiciled citizen by such proceedings in the nature of service of process, as, by the law of the state was made equivalent to personal service within its jurisdiction.

While a person maintains the relation of a citizen of the state he is subject to its laws, which he cannot avoid by a temporary or prolonged absence from the state. Therefore a judgment of divorce rendered by the courts of the state against such a citizen upon a substituted service of process, such as is authorized in the case of an absent defendant, is valid to effect the dissolution of the marriage contract, and is conclusive upon the defendant in every other state, although the husband was not within the territorial jurisdiction during the progress of the suit, and did not appear therein. *Matter of Denick*, 92 Hun, 161; 71 N. Y. St. Repr. 549; 36 N. Y. Supp. 518.

A foreign decree of divorce rendered against a citizen of this state on service by publication is valid, if the foreign state was the last joint domicile of the parties. *Callahan v. Callahan*, 65 Misc. Rep. 172; 121 N. Y. Supp. 39.

A foreign divorce upon the ground of abandonment obtained by a wife in a state where both parties were domiciled, is valid here although the summons was served by publication while the husband was temporarily sojourning in this state without an intention of making it his permanent residence. Hence, the wife cannot maintain a subsequent action for divorce in this state on the ground that her husband was guilty of adultery in remarrying after the divorce obtained by her. *Lacey v. Lacey*, 38 Misc. Rep. 196; 77 N. Y. Supp. 235.

Foreign judgment as bar.

Where a husband sued for maintenance and support in a foreign state defended upon the ground that the marriage had been annulled in this state because the wife had a former husband living, a foreign judgment against the plaintiff bars a subsequent action by her to set aside the decree of annulment upon the ground that it was obtained by fraud. *Everett v. Everett*, 180 N. Y. 452.

Injunction against prosecution of foreign action.

The prosecution of an action brought in a foreign state by a woman to procure a judgment setting aside a judgment of divorce obtained by her against her husband in that state will not be enjoined in an action brought in this state by a woman whom the divorced husband subsequently married, she not being a party to the foreign action for divorce, and not made party to the action sought to be enjoined.

It seems, that if she has any interest in the subject matter of the foreign action to set aside the divorce she should ask leave to intervene in the foreign tribunal. *Guggenheim v. Wahl*, 138 App. Div. 269; 122 N. Y. Supp. 941.

CHAPTER X.

PROPERTY AND PERSONAL RIGHTS OF HUSBAND AND WIFE.

It is impossible to grasp the significance of the modern statutes affecting the property rights of a married woman without understanding her position at common law, and also the steps taken by equity to moderate the rigor of the common law. A brief statement of the situation follows.

At common law the wife's identity was merged in that of her husband. They were, in theory, one person, and on this basis is built the law of their rights and duties. The civil law, of more mature experience, thought differently, and to the civil law (and to equity the offshot of the civil law), we must look for the basis of modern legislation.

"By marriage the husband and wife are one person in law; that is the very being or legal existence of the woman is suspended during the marriage or at least incorporated and consolidated into that of the husband; under whose wing, protection, and *cover* she performs everything; and is therefore called in our law-french *feme covert*, *foemina viro co-operata*; is said to be *covert-baron* or under the protection and influence of her husband, her *baron* or lord; and her condition during her marriage is called her *coverture*. * * * For this reason a man cannot grant anything to his wife or enter into covenant with her, for a grant would be to suppose her separate existence and to covenant with her would be only to covenant with himself." 1 Bl. Com. 442.

"In the civil law the husband and wife are considered as two distinct persons and may have separate estates, contracts, debts, and injuries, and therefore in our Ecclesiastical courts a woman may sue or be sued without her husband." 1 Bl. Com. 444.

Speaking of the common law says Christian in his note to Blackstone (1 Bl. Com. 455): "Nothing I apprehend would more conciliate the good will of the student in favor of the laws of England than the persuasion that they had shown a partiality to the female sex. But I am not so much in love with my subject as to be inclined to leave it in possession of a glory which it may not justly deserve."

At common law the husband, by marriage, gained absolute title to his wife's chattels (choses in possession), he could dispose of them as he pleased, during his lifetime, or by will. The wife's paraphernalia (clothing and articles peculiarly appertaining to a woman), became hers on her husband's death, if he did not see fit to dispose of them during his lifetime.

"The sixth method of acquiring property and goods and chattels is by marriage; whereby those chattels which belonged formerly to the wife are by act of law vested in the husband with the same degree of property and the same powers as the wife when sole had over them." 2 Bl. Com. 433.

"A woman's personal property by marriage becomes absolutely her husbands which at his death he may leave entirely away from her." 1 Bl. Com. 445, note.

"As to personal property of the wife which she had in possession at the time of the marriage in her own right and not *en outre droit*, such as money, goods, chattels and movables, they vest immediately and absolutely in the husband and he can dispose of them as he pleases and on his death they go to his representatives as being entirely his property." 1 Kent. Com. 143.

"The husband during the coverture may take the rents and profits of the whole estate of his wife. * * * If a legacy be given to the wife the husband alone may take or release it." Comyns Digest, Baron and Feme, O.

Paraphernalia.

Defining paraphernalia Blackstone says: "Our law uses it to signify the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a peeress usually worn by her have been held to be paraphernalia. These she becomes entitled to at the death of her husband over and above jointure or dower and preferably to all other representatives. Neither can the husband devise by his will such ornaments and jewels of his wife, though during his life perhaps he hath the power (if unkindly inclined to exercise it) to sell them or give them away." 2 Bl. Com. 436.

Under the provisions of the act of 1860 as amended by chapter 172 of the Laws of 1862 it was held that the paraphernalia of a wife given to her by her husband became clothed with all the incidents of a legal estate, so that she could sue for an injury to or conversion thereof. *Rawson v. Penn. R. R. Co.*, 48 N. Y. 212.

The importance of the law of Paraphernalia fades in the light of modern legislation.

At common law incorporeal personal property (choses in action), owned by the wife could be reduced to possession by an action brought by the husband, and in such case, but not otherwise, the proceeds of the action became absolutely his.

"As to debts due to the wife at the time of her marriage or afterwards by bond, note or otherwise, and which are termed choses in action, they are not vested absolutely in the husband, but the husband has power to sue for and recover or release or assign the same; and when recovered and reduced to possession, and not otherwise, it is evidence of a conversion of the same to his own use and the money becomes in most cases absolutely his own." 2 Kent. Com. 135.

Speaking of the rights acquired by a husband in his wife's property marriage, Blackstone says: "So it is also of chattels personal (or choses in action): as debts upon bond, contracts and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And upon such receipt or recovery they are absolutely and entirely his own; and shall go to his executors or administrators or as he shall bequeath them by will, and shall not re-vest in the wife. But if he dies before he has recovered or reduced them into possession so that at his death they shall continue choses in action, they shall survive to the wife." 2 Bl. Com. 434.

At common law the husband had an absolute right to the rents and profits of his wife's real estate during coverture. But at her death it went to her heirs, save as the husband might have a life estate by the courtesy of England.

"In real estate he (the husband) only gains a title to the rents and profits during coverture; for that depending upon foedal principles remains entire to the wife after the death of her husband or to her heirs if she dies before him; unless by the birth of a child he becomes tenant for life by the courtesy." 2 Bl. Com. 433.

"If the wife at the time of marriage be seized of an estate by inheritance in land, the husband upon the marriage becomes seized of the freehold *jure uxoris* and he takes the rents and profits during their joint lives. * * * It will be an estate in him "for the life of the wife only unless he be a tenant by the courtesy." 2 Kent. Com. 130.

So too if the wife at the time of marriage had a life estate, her husband became seized of such estate.

He became seized of her chattels real and could dispose of them without her consent at any time during his lifetime. 2 Kent. Com. 134.

There were certain exceptions to these rules. For example a wife could purchase an estate in fee without her husband's consent, and the conveyance was good if the husband did not avoid it by some act declaring his dissent, but the conveyance of a *feme covert* was absolutely void at law. 2 Kent Com. 150.

Another exception was that if the husband lived abroad or was banished, the wife could contract and sue and be sued as if she were a *feme sole*. 2 Kent Com. 154.

At common law a wife could neither sue without joining her husband as plaintiff with his consent, nor could she be sued unless he were made defendant, except when he had abjured the realm, etc.

Nor could she leave her property by will.

"If the wife be injured in her person or property she can bring no action for redress without her husband's concurrence and in his name, as well as her own; neither can she be sued without making the husband a defendant," with an exception however that she may be sued as a *feme sole* if her husband abjured the realm, was banished, suffered civil death, etc. 1 Bl. Com. 443.

"And with regard to *feme coverts* our law differs still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a *feme sole*. But with us a married woman is not only utterly incapable of devising land, being excepted out of the statute of wills, but also she is incapable of making a testament of chattels, without the license of her husband." 2 Bl. Com. 498.

"A wife cannot devise her lands by will for she is excepted out of the statute of wills, nor can she make a testament of chattels except it be of those which she holds *en autre droit* or which are settled on her as separate property without the license of her husband." 2 Kent. Com. 170.

Equity founded upon and following the principles of the Civil (or Roman) law took the first steps towards the emancipation of married women as respects their rights of property.

Equity allowed a married woman to enjoy property through the medium of a trustee holding legal title, and finally came to appoint, imagine, or dispense with a trustee, if he were wanting.

So, too, equity enforced the wife's right to a settlement for her support, if the aid of equity were sought to reduce her property to possession.

And equity also would enforce the rights of a married woman in property settled upon her with an intention that it be free from her husband's control.

"At common law a married woman was not allowed to possess personal property independent of her husband. But in equity she is allowed through the medium of a trustee to enjoy property as freely as a *feme sole*; and it is not unusual to convey or bequeath property to a trustee in trust to pay the interest or income thereof to the wife for her separate use free from the debts, control or interference of her husband. * * * In such cases the husband has no interest in the property though after the interest is actually received by the wife, it then might be considered as part of the husband's personal estate. * * * The husband himself may be the trustee." 2 Kent Com. 162.

"In equity there was a recognition of a capacity in the married woman to enjoy property separate from her husband and that too when she came by it during coverture. * * * Nor need there have been a trustee named in the instrument. The law would create the husband a trustee for the wife in such case." Wood v. Wood, 83 N. Y. 575.

"The wife's equity to a reasonable provision out of her property for the support of herself and her children makes a distinguished feature in the modern chancery cases, which relate to the claims of the husband upon the property of his wife in action. If the husband wants the aid of chancery to enable him to get possession of his wife's property or if her fortune be within the reach of the court, he must do what is equitable by making a reasonable provision out of it

for the maintenance of her and her children." 2 Kent. Com. 139.

Judge Story says: "In courts of equity although the principles of law in regard to husband and wife are fully recognized and enforced in proper cases, yet they are not exclusively considered. On the contrary courts of equity for many purposes treat the husband and wife as the civil law treats them, as distinct persons capable in a limited sense of contracting with each other, of suing each other and of having separate estates, debts and interests." 2 Story Eq. Jur. § 1368.

"If by marriage settlement the real and personal estate of the wife be secured to her separate use, the husband is accountable for that part of it which comes to his hands. . . These marriage settlements are benignly intended to secure to the wife a certain support in any event, and to guard her against being overwhelmed by the misfortune or unkindness or vices of her husband. * * * A court of equity will carry the intention of these settlements into effect and not permit the intention to be defeated." 2 Kent. Com. 165.

MARRIED WOMAN'S ACTS: NATURE AND OBJECT.

The so-called Married Woman's Acts in the State of New York on a series of statutes, beginning with chapter 200 of the Laws of 1848, intended to enlarge the property, and other rights, of married women.

Step by step these rights have been enlarged and at present, the legal position of a wife is substantially the same as that of a feme sole, save that she is entitled to support from her husband, and still owes some duty of domestic service to her husband.

The majority of these statutes are now consolidated into the Domestic Relations Law, and will be found distributed under various captions following.

In 1848 the legislature of this state began very cautiously to sever the merger of identity between husband and wife.

and by 1862 had progressed so far as to permit a married woman to carry on business and make contracts with reference to her separate estate (Laws of 1848, Chap. 200; Laws of 1860, Chap. 90; Laws of 1862, Chap. 172) and legislation continued to advance by gradual and seemingly reluctant steps until in the course of half a century complete freedom of contract was extended to married women with reference to every subject except the contract of marriage itself. Vann, J., in *Winter v. Winter*, 191 N. Y. 462.

Chapter 200 of the Laws of 1848; chapter 375 of the Laws of 1849; and chapter 90 of the Laws of 1860, have been denominated enabling acts.

In referring to the acts of 1848 and 1849 the Court of Appeals held that the effect of these acts was to divest the husband's marital title during coverture; and they enabled a wife to purchase property whether she had a separate estate before or not, and her purchase on credit vests no title in her husband during coverture, but only in her. *Knapp v. Smith*, 27 N. Y. 277.

It was held in the case of *Vanneman v. Powers*, 56 N. Y. 39, that the married woman's statutes have only affected her liability in matters relating to her separate estate or effects; in other respects the common-law rule of liability still prevails.

Liability of a married woman upon contracts generally under the enabling acts of 1848, 1849 and 1860.

Under these statutes it was held that the liability of a married woman upon contracts may be enforced: (1) When created in or about carrying on trade or business. (2) When the contract relates to or is made for the benefit of her separate estate. (3) When the intention to charge her separate estate is expressed in the instrument or contract by which the liability is created. *Manhattan Manufacturing Co. v. Thompson*, 58 N. Y. 80; *Frecking v. Rolland*, 53 N. Y. 422; *Phillips v. Wicks*, 14 Abb. N. S. 380; *Saratoga County Bank v. Pruyn*, 90 N. Y. 250.

If the contract does not make an express charge upon her separate

estate, it must be shown to have been made in or about the trade or business carried on by her or for the benefit of her separate estate. *Nash v. Mitchell*, 71 N. Y. 199.

It must be shown that the obligation was made negotiable in respect to her business or estate. *Bogert v. Gulick*, 65 Barb. 322.

Prior to the passage of the Enabling Act of 1884, a married woman who had no separate estate, and was not engaged in any separate business, was incapable, by reason of her coverture, of making a contract. Even where she had a separate estate, a promissory note made by her was open to the defense of want of consideration, although in the hands of a *bona fide* holder for value. *Linderman v. Farquharson*, 101 N. Y. 434.

Though the husband was absolutely entitled to reduce his wife's personal property to possession before the Married Woman's Act of 1848, he could waive such right, and permit his wife to hold the same as her separate estate, and yet receive it from her upon trust for the benefit of their son. *Dorland v. Dorland*, 59 App. Div. 37; 69 N. Y. Supp. 179.

The rules laid down in the case of *Saratoga County Bank v. Pruyn*, 90 N. Y. 250, and earlier in the cases of *Manhattan Manufacturing Co v. Thompson*, 58 N. Y. 80, and *Frecking v. Rolland*, 53 N. Y. 422, are materially changed. As the statute now stands the power of a married woman to contract is practically unlimited. She may bind her separate estate without regard to the purpose, intention or subject-matter of the contract. A great number of cases arising under the enabling acts prior to the Act of 1884, relating to the liability of a married woman under her contracts, and limiting, qualifying, and distinguishing such liability, are no longer applicable, and need not be referred to. It seems sufficient to note that her liability under her contracts is the same as that of an unmarried woman.

REAL ESTATE OF MARRIED WOMEN.

Under the statute the right, title and interest of a married woman in and to her lands, and the income therefrom, is the same as if she were unmarried.

The husband has no title or interest whatever, save as he may be tenant by the courtesy—a mere possibility. See *Courtesy*, post, p. 361.

Domestic Relations Law. § 50. Property of married women.

Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall

continue to be her sole and separate property as if she were unmarried, and shall not be subject to husband's control or disposal nor liable for his debts.

Since a married woman may hold real estate in her own right and may convey the same as if she were unmarried, there attaches to her title all the usual incidents and marks of ownership. She holds possession of her lands as completely as if she were *feme sole*, and delivers such possession to the purchaser by some act or instrument as would have been effectual for that purpose before her marriage. If the real estate be a dwelling-house in which she resides, the person of her husband there as the head of the family cannot in the least detract from her full possession and ownership. Her title and possession are consistent with all the rights and duties that arise out of the marital relation. The fact that the husband occupies a house owned by his wife and pays the taxes on it, and keeps it in repair cannot in the least impair her title to the possession of the property. *Mygatt v. Coe*, 152 N. Y. 457.

A married woman, as a necessary incident to her right to acquire property and possess it, independent of the control or interference of her husband, is competent, although living with her husband, to secure and maintain legal possession of property acquired by her, free and independent of the rights of persons claiming an interest therein through or under her husband. *Stanley v. National Bank*, 115 N. Y. 122.

Since the acts relating to the property of married women, there is no presumption that the husband is in possession of lands belonging to the wife, and upon which they both live, and on ejectment against the husband to recover possession of such lands it is a question of fact whether the wife is occupying the lands, or has given possession thereof to her husband. *Martin v. Rector*, 101 N. Y. 77.

There must be a surrender by a wife to her husband of some interest or dominion over her real property by some act or agreement on her part, express or implied, which will take from her at least some right or incident ordinarily pertaining to the absolute ownership of the real estate in order to give him a legal possession of her premises on which they live together. *Mygatt v. Coe*, 147 N. Y. 456.

The court, in the case of *McIlvaine v. Kadel*, 3 Robt. 429, says: "The act for the protection of the property of a married woman has worked a complete radical change in the marital rights of the husband. Their old common-law right to the personal estate of the wife, and the use of her real estate, has gone; they have no estate, or interest or right whatever, absolute or contingent, except that, upon the death of the wife, after issue born, without exercising the *jus disponendi*, a husband has the estate for his life as tenant by the curtesy. A married woman may hold her estate during life discharged of all control over or power of disposal by her husband, and may convey it in his lifetime or devise it by will to take effect on her death to whomsoever she pleases."

Where lands purchased with the moneys of a wife were conveyed to her husband without her knowledge she can assert her title although he secured credit by representations that he owned the property unless it appear that she knew that he was holding himself out as owner. *Woolsey v. Henn*, 85 App. Div. 331; 82 N. Y. Supp. 394.

The court, in *Blood v. Humphrey*, 17 Barb. 662, uses this emphatic language: "The legislature intended to remove the entire disability which both the common law and the statute had thrown around married women, not only as regards their right to take and hold free and independent of their husbands, but also to remove the obstacles which the law had interposed against their conveying both by grant and devise, and to place them, so far as the lands which they held in their own right are concerned, on the same basis, precisely, as unmarried females." Judge Denio, in *White v. Wagner*, 25 N. Y. 333, said: "By assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power as

though she was not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provisions of law."

Under the statutes of this state a married woman has such freedom and control over her own real property that her husband cannot, without her consent, and against her will, maintain a vicious domestic animal thereon, and she is liable for injuries committed by such animal, although it is owned by the husband. *Quilty v. Battie*, 135 N. Y. 201.

It is not necessary that the husband of a donee of a power of sale coupled with an interest join in her conveyance. *Vines v. Clarke*, 111 App. Div. 12; 97 N. Y. Supp. 532.

Where a wife mortgages her lands solely to secure money previously advanced to her husband, she is merely a surety for his debt and where there is no evidence that the mortgage was taken in payment of the debt, a cancellation thereof by the will of the creditor releases the wife as surety and the mortgage is operative in so far as the husband's estate is insufficient to pay the debt. *Dibble v. Richardson*, 171 N. Y. 131.

A wife owning lands and allowing improvements to be made thereon ordered by her husband is liable in an action to foreclose a mechanic's lien filed by persons furnishing labor and materials. *Schummer v. Clark*, 107 App. Div. 207; 95 N. Y. Supp. 836.

TENANCY BY THE ENTIRETY.

When a conveyance of lands is made to husband and wife they take as tenants by the entirety, not as tenants in common, unless a contrary intention be expressed. On the death of either, the survivor takes the whole estate. This common law rule has not been changed by the Married Woman's Acts, though they may divide or partition lands so held.

Domestic Relations Law. § 56.

*Husband and wife may * * * make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. If so expressed any real property held by them as tenants in common, in the instrument of partition or division such instrument bars the wife's right to dower in such property, and also if so expressed, the husband's tenancy by courtesy.*

On a devise or conveyance of lands to a husband and wife it is presumed that they take as tenants by the entirety.

though the presumption may be negatived by words indicating that they are to take as joint tenants or as tenants in common. *Booth v. Fordham*, 100 App. Div. 115; 91 N. Y. Supp. 406; *aff'd.* 185 N. Y. 535.

On the death of one of two tenants by the entirety the survivor takes all. *McArthur v. Weaver*, 129 App. Div. 743; 113 N. Y. Supp. 1095.

The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant, or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife, and his right to rents and profits in her lands, *jure uxoris*, during their joint lives was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. The acts relating to the rights of married women have not abrogated the common-law doctrine of tenancy by the entirety, and under a conveyance to a husband and wife they take, not as tenants in common or joint tenants, but by entirety, and upon the death of either, the survivor takes the whole estate. As the right of the husband to the rents and profits in the wife's lands during their joint lives, has been completely swept away by such statutes, he is not exclusively entitled to the usufruct of the lands so held by them in entirety, but they are tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits so long as the question of survivorship is in abeyance. *Hiles v. Fisher*, 144 N. Y. 306; *Bartles v. Nunan*, 92 N. Y. 152; *Zorntlein v. Bram*, 100 N. Y. 12.

The common-law rule that husband and wife to whom land is conveyed take as tenants by the entirety, and not as tenants in common, or as joint tenants, is not abrogated by the Real Property Law, which

provides that every estate granted or devised to two or more persons in their own right shall be considered a tenancy in common, unless expressly declared to be a joint tenancy. *Price v. Pestka*, 54 App. Div. 59; 66 N. Y. Supp. 297.

A conveyance of lands to a person named "and his wife" creates a tenancy by the entirety, even though the wife be not designated by her name, if there be no question as to her identity. *McArthur v. Weaver*, 129 App. Div. 743; 113 N. Y. Supp. 1095.

Duress by husband.

Where a prospective husband by duress compelled his prospective wife to deed her property so as to make them tenants by the entirety the court will annul the deed although the marriage has taken place and is existing at the time of trial. *Ring v. Ring*, 127 App. Div. 411; 111 N. Y. Supp. 713.

Interest in purchase money mortgage.

Where husband and wife as tenants by the entirety convey their lands and take a purchase money mortgage payable to both, the survivor is not entitled to the whole proceeds of the mortgage. The mortgage being personal property, the rules governing a tenancy by the entirety do not apply. *Matter of Baum*, 121 App. Div. 496; 106 N. Y. Supp. 113; appeal dismissed, 190 N. Y. 564.

Conveyance and partition of title.

Under the provisions of the Domestic Relations Law allowing a husband and wife to convey to each other, the husband may convey to his wife his interest in lands of which they are seized, as tenants by the entirety. After such conveyance both he and his wife are estopped from questioning the title of her grantee. *Hardwick v. Salzi*, 46 Misc. Rep. 1; 93 N. Y. Supp. 265.

The statute enabling husband and wife to convey to each other abrogates their common law unity and hence, where a husband conveys to himself and wife for their joint lives, the survivor to become absolute owner, and the conveyance is made to their heirs and assigns forever, no tenancy by the entirety is created and the husband may maintain an action for partition. *Saxon v. Saxon*, 46 Misc. Rep. 202; 93 N. Y. Supp. 191.

Sale on Execution.

The tenancy by the entirety in lands is recognized in this state and the interest of the husband as tenant by the

entirety is liable to sale on execution subject to the wife's right of survivorship. *Wardt v. Scharmach*, 65 Misc. Rep. 124; 119 N. Y. Supp. 449.

Husband and wife who are tenants by the entirety occupy as tenants in common during their joint lives, each being in possession of an undivided one-half. Although a husband's interest in lands held by him and his wife as tenants by the entirety is subject to sale on execution his right of redemption and possession does not pass except under the sheriff's deed and is exempted from the sale. Hence, it cannot be reached by a receiver appointed in supplementary proceedings. *Steenberge v. Low*, 46 Misc. Rep. 285; 92 N. Y. Supp. 518.

ANTE-NUPTIAL CONTRACTS.

Ante-nuptial agreements, or marriage settlements if fair were enforceable in equity before the Married Woman's Acts. The promise to marry when fulfilled was a good consideration for the antenuptial promise.

The present statute expressly states that such contracts remain in force after marriage.

Domestic Relations Law. § 53. Contracts in contemplation of marriage.

A contract made between persons in contemplation of marriage, remains in full force after the marriage takes place.

Before the enactment of the statutes conferring rights on married women, marriage settlements were valid and enforceable in equity. A voluntary settlement was made good by a subsequent marriage. On the subject of marriage settlements at common law, see 2 Kent Com. 173 to 178.

"These settlements previous to marriage seem to have been in use among the ancient Germans and their kindred Nation, the Gauls." 2 Bl. Com. 138, note.

Ante-nuptial contracts by which it is attempted to regulate and control the interests which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts, and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises. *Johnston v. Spicer*, 107 N. Y. 185.

A wife may have an action to enforce an ante-nuptial agreement in which the husband agreed to convey certain real property to the wife, and to pay her a sum of money. Specific performance may be had of an agreement to convey, and damages for the breach of contract to pay the money. This relief may be obtained in one action, but the defendant is entitled to a jury trial of the action for damages. *Van Deventer v. Van Deventer*, 32 App. Div. 578; 53 N. Y. Supp. 236.

Where an ante-nuptial agreement in contemplation of marriage provided that the wife should receive a certain sum in lieu of dower if she survived her husband, the wife's representative can recover of the husband's representative on the agreement although the husband shot and killed his wife before committing suicide, as her possibility of surviving him was prevented by his own wrongful act. *Logan v. Whitley*, 129 App. Div. 666; 114 N. Y. Supp. 255.

An ante-nuptial agreement whereby a prospective husband promised his prospective wife to adopt her daughter and make the child his heir unless he should have children of his own, in which case he was to divide his property equally between them and the adopted child, did not prevent him from using his property for reasonable purposes during his lifetime or prevent him from bequeathing a reasonable amount to charity. No trust was created for the benefit of the adopted child. *Dickinson v. Seaman*, 193 N. Y. 18.

Under section 3 of the Act of 1849, it was held that parties could

avoid the effect of marriage upon their property relations by an ante-nuptial contract, although at common law such a contract was invalid. *Matter of the Estate of Young v. Hicks*, 92 N. Y. 235.

An ante-nuptial contract by which the future wife releases all her claims against the estate of her husband upon his decease will be sustained when fairly made, but it is subject to rigid scrutiny. *Pierce v. Pierce*, 71 N. Y. 154.

An ante-nuptial contract made in contemplation of marriage whereby property belonging to the woman was placed in trust during the marriage free from the husband's debts, income payable to the wife, with a power of appointment in her, was held to be intended to continue only during coverture so that on the death of the husband, the wife was entitled to have the trust declared terminated. *Sharman v. Jackson*, 98 App. Div. 187; 90 N. Y. Supp. 469.

A husband by ante-nuptial agreement may waive the provisions of chapter 360 of the laws of 1860 as where the parties agree that on the death of either the other shall take no interest in the decedent's property. *Matter of Stilson*, 85 App. Div. 132; 83 N. Y. Supp. 67.

A note given in consideration of a promise to marry is valid in the hands of the wife after marriage and an action may be maintained thereon by her against her husband. *Wright v. Wright*, 54 N. Y. 437.

Where an ante-nuptial agreement provided that if the husband survived the wife he should have absolute title to all her personal property, the agreement merely operates to give the husband, in the event of survival, title to the residuum of personal property after the wife's estate has been duly administered. *Foehner v. Huber*, 42 App. Div. 439; 59 N. Y. Supp. 447; *affd.*, 166 N. Y. 619.

Ante-nuptial settlements were considered in *Boiland v. Welsh*, 162 N. Y. 104; *Brown v. Wadsworth*, 168 N. Y. 225.

Agreement by Third Person for wife's benefit.

A contract by which a father covenants to perform certain promises if his son marries a certain woman is valid, as where he agrees to execute a will in his son's favor. *Sarasohn v. Kamaiky*, 193 N. Y. 203.

The common-law unity of husband and wife survives for the purpose of aiding the wife to enforce a covenant for her benefit, made with her husband by a third party, and which equity and common sense approve. The authorities as to the relation of husband and wife as consideration for a covenant by third parties with the husband for the benefit of the

wife, collated and approved. *Buchanan v. Tilden*, 158 N. Y. 109.

A note given by a third person to a husband to deliver to his wife as payee in order to secure domestic peace between them is without consideration and the wife cannot recover from the maker, although the instrument contained the words "value received." *Kramer v. Kramer*, 181 N. Y. 477; revg. 90 App. Div. 176; 86 N. Y. Supp. 129.

Ante-nuptial agreements made in foreign state.

A marriage settlement made in Germany, in contemplation of the parties living in Maryland, may be enforced in New York, and the plaintiff may have a trustee appointed and an accounting between the parties holding the trust property and the trustee so appointed. *Gleitsmann v. Gleitsmann*, 60 App. Div. 371; 70 N. Y. Supp. 1007.

An ante-nuptial contract executed in the state of Connecticut, by the terms of which a husband agrees that he "will not claim to have or pretend to have any right or interest in or to any part of her estate, or of the income thereof, but will permit the same to pass by her will to her devisees, or by descent to her heirs-at-law, as the same would pass if she had remained single and unmarried," is valid, and constitutes a bar to any tenancy by curtesy on the part of the husband in the lands of the wife in the state of New York. The rule that legal privity must exist between the promisee and a third party in order to enable the latter to sue upon a promise alleged to have been made for his benefit, does not apply to ante-nuptial contracts or to agreements of a similar nature. Such an ante-nuptial contract must be regarded as made for the benefit of any person to whom the wife's property passes by devise or descent. *White v. White*, 20 App. Div. 560; 47 N. Y. Supp. 273.

An ante-nuptial contract made by an infant is voidable only at the option of the infant on arriving at age. *Beardsley v. Hotchkiss*, 96 N. Y. 201.

If the infant does not, within a reasonable time, seek to avoid it, she will be deemed to have ratified it. The trustee under the settlement cannot raise such objection against a claim for an accounting. *Jones v. Butler*, 30 Barb. 641, 20 How. Pr. 189.

Infancy of parties to ante-nuptial contracts.

It has been stated that the above provision of the statute comprehends ante-nuptial contracts made by infants in respect to either their real or personal property, and an ante-nuptial settlement by a female infant of all her real and personal property in trust is valid, and not impeachable on the mere ground that she was an infant at the time of its execution. *Wetmore v. Kissam*, 3 Bosw. 321. See also *McElvaine v. Cadel*, 3 Robt. 429.

But ante-nuptial contracts are subject to rigid scrutiny and will be set aside if unfair.

The courts will regard with rigid scrutiny an ante-nuptial contract which deprives a wife of any prospective interest in the estate of her husband, especially where no provision is made therein for her support in case she survives him. Where it appears that the husband is possessed of real estate to the value of \$100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the contract; that the husband then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower right; that no consideration was paid for the surrender, and that the wife acted without the aid of counsel, the ante-nuptial contract should be set aside. *Graham v. Graham*, 143 N. Y. 573.

But where it appeared that the contract was entered into without fraud on the part of the husband; that the parties were married to settle an action which was pending against

the husband for seduction, the contract was held to be valid, since the marriage was an ample consideration to support the contract. *Davis v. Wood*, 31 N. Y. St. Rep. 604; 10 N. Y. Supp. 460.

The relation of parties betrothed is one of confidence especially on the part of the woman, and if she agrees before marriage to release all claims upon his estate in consideration of a grossly inadequate sum without consulting others and in ignorance of the circumstances of the intended husband the burden of proof is upon the legal representatives of the husband in an action brought by the wife to secure her dower interest. *Warner v. Warner*, 18 Abb. N. C. 151.

As to when an ante-nuptial agreement, executed in view of marriage, and which provided that in event of the death of one party the survivor should take the estate of the deceased party, was held not to create a presumption that it was procured by fraud or undue influence, on the part of the husband, see *Green v. Benham*, 57 App. Div. 9; 68 N. Y. Supp. 248.

Agreements made in consideration of marriage must be in writing, except a promise to marry.

Personal Property Law. § 31. Agreements required to be in writing.

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

* * * * *

3. Is made in consideration of marriage, except mutual promises to marry.

Marriage is not such part performance of an oral ante-nuptial contract based solely upon the consideration of marriage as takes it out of the operation of the statute of frauds. Hence, such oral contract cannot be specifically enforced by a court of equity. The statute requires every agreement

or undertaking made upon consideration of marriage except mutual promises to marry to be in writing. *Hunt v. Hunt*, 171 N. Y. 396.

It seems, that all verbal agreements as to a marriage settlement made between prospective husband and wife or by third persons are unenforcible if the marriage takes place before the execution of the contract, as it is merged in the marriage. *Kramer v. Kramer*, 181 N. Y. 477.

An ante-nuptial agreement to give a prospective wife a portion of a savings bank deposit in consideration of marriage is void if not in writing. *Schneider v. Schneider*, 122 App. Div. 774; 107 N. Y. Supp. 792.

As to when an oral ante-nuptial agreement is not sufficient consideration for a debt from husband to wife as against the husband's creditors, see *Whyte v. Denike*, 53 App. Div. 320; 65 N. Y. Supp. 577.

If the parties be incompetent to marry there is no consideration for an ante-nuptial agreement.

Where a woman was incompetent to marry because she had a husband living, an ante-nuptial agreement made in consideration of another marriage is without consideration. *Hosmer v. Tiffany*, 115 App. Div. 303; 100 N. Y. Supp. 797.

A promise to marry, made at a time when the promisor is already married, being void, is not a consideration for an assignment. *Howe v. Hagan*, 110 App. Div. 392; 97 N. Y. Supp. 86.

Property passing under an ante-nuptial contract is not subject to a transfer tax.

An ante-nuptial agreement to pay a wife a sum in lieu of dower is not subject to a transfer tax, being in the nature of a debt. *Matter of Baker*, 83 App. Div. 530; 82 N. Y. Supp. 390; *affd. on opinion below*, 178 N. Y. 575.

An ante-nuptial transfer of property by a man to his prospective wife in contemplation of marriage and a retransfer by her in trust is not subject to a transfer tax. *Matter of Miller*, 77 App. Div. 473; 78 N. Y. Supp. 930.

CONTRACTS BETWEEN HUSBAND AND WIFE AFTER MARRIAGE.

At common law husband and wife could not contract with each other (save as equity would enforce a contract made through the intervention of a trustee); and this on the theory that they were one person.

But, under the statute, husband and wife may contract freely, one with the other, save to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. The intervention of a trustee is no longer necessary, and the statute provides that a trustee holding property for a married woman may convey it to her.

Domestic Relations Law. § 56. Husband and wife may convey to each other or make partition..

Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. If so expressed in the instrument of partition or division, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by courtesy.

Domestic Relations Law. § 59. Compelling transfer of trust property.

A person who holds property as trustee of a married woman, under a deed of conveyance or otherwise, may, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court, that he has examined the condition and situation of the property, and made inquiry into the capacity of such married woman to manage and control the same, convey to such married woman all or any portion of such property, or the rents, issues or profits thereof.

Domestic Relations Law. § 51. Powers of married woman.

A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may confess a judgment specified in section one thousand two hundred and seventy-three of the code of civil procedure.

At common law a husband and wife were regarded as one person and to a great extent the wife's legal existence was lost, or suspended during the continuance of the marriage. She was called a *feme covert*. 1 Bl. Com. 442; 2 Kent Com. 129.

Thus in law no contract could be made between husband and wife without the intervention of trustees for she was considered to be under his power, and incapable of contracting with him. 2 Kent Com. 129.

"Husband and wife are one person in law. And therefore, by no conveyance at the common law, could the husband give an estate to his wife. Nor the wife to the husband. So an husband cannot covenant, or contract, with his wife." Comyn's Digest, Baron and Feme, D. 1.

Under the Domestic Relations Law a married woman may make contracts with respect to her property with any

person "including her husband" and her liabilities under such contracts are the same as if she were unmarried. Prior to chapter 594 of the Laws of 1892, amending section 1 of chapter 381 of the Laws of 1884, a married woman could not make contracts with her husband, except in relation to her separate estate. *Blaechinski v. Howard Mission and Home*, etc., 130 N. Y. 497.

At common law every contract between husband and wife made without the intervention of a trustee as well as any contract between the wife and a third person is void. This, on the theory that the legal existence of the wife was merged in that of her husband. As by virtue of the statute a married woman can now contract directly with her husband, she need not resort to equity to enforce an agreement for her support and maintenance made by the husband at a time when they were living apart, but can sue thereon at law. *Winter v. Winter*, 191 N. Y. 462.

Prior to the Act of 1887, a married woman could not take and hold property by conveyance from her husband nor could a wife convey real estate to her husband. *Johnson v. Rogers*, 35 Hun, 267; *Winans v. Peebles*, 32 N. Y. 423; *White v. Wager*, 25 N. Y. 328.

Where the wife had advanced the purchase money from her own earnings, a conveyance of the real property to her by her husband is valid in equity as against his creditors, although made prior to the Act of 1887. *Fitzpatrick v. Burchill*, 7 Misc. Rep. 463; 59 N. Y. St. Repr. 872; 28 N. Y. Supp. 389.

And where, in 1871, a married woman executed and delivered to her husband a quit-claim deed of land conveyed to her in 1864, the consideration for which was paid by him from his earnings, it was held that if it appeared that she took as trustee, equity would support the conveyance made by her, but in the absence of evidence to support that con-

clusion her deed to her husband was void. *Scott v. Calladine*, 79 Hun, 79; 61 N. Y. St. Repr. 172; 29 N. Y. Supp. 630; *affd.* 145 N. Y. 639.

A deed by a married woman to her husband dated before the enactment of the Act of 1887, but delivered after it became a law, is a valid conveyance, since the delivery completes the conveyance. *Reynolds v. City National Bank*, 71 Hun, 386; 55 N. Y. St. Repr. 45; 24 N. Y. Supp. 1134; *affd.* 151 N. Y. 641.

Prior to the Act of 1887 a mortgage given by a wife to her husband was invalid at law, and did not operate to transfer any right except such as equity would enforce as founded upon a valuable or meritorious consideration. *Cheney v. Thornton*, 43 N. Y. St. Rep. 510; 17 N. Y. Supp. 545.

Under the Act of 1887, a conveyance by a husband to a wife without valuable consideration is good both at law and in equity. *Talcott v. Levy*, 29 Abb. N. C. 3. But such a conveyance must be with an honest intent and not for the purpose of hindering, delaying or defrauding creditors. *Spaulding v. Keyes*, 125 N. Y. 113.

Where a wife having only an inchoate dower in real property joins with her husband in the conveyance to a third party, and the husband takes back a joint mortgage payable to himself and his wife, there is a presumption that he intends to give the bond and mortgage to his wife if she survives him. *Wilcox v. Murtha*, 41 App. Div. 408; 58 N. Y. Supp. 783.

Undue influence will not be presumed where the husband transfers his property to a faithful wife when in failing health. Nor will such transfer be set aside at the instance of relatives upon the mere proof of vagaries and eccentricities. *Hoey v. Hoey*, 28 Misc. 396; 59 N. Y. Supp. 946; *affd.* 53 App. Div. 208; 65 N. Y. Supp. 778.

A husband and wife may enter into copartnership, and the wife is liable on the obligation entered into in the copartnership name. *Graff v. Kinney*, 37 Hun, 405.

Where a husband gives his wife all his earnings to apply the same to the expenses of their home and to keep the remainder for his use and benefit, a trust is created which will be enforced if no rights of credi-

tors or third parties intervene. *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

Where a wife sues her husband's estate for the specific performance of an alleged agreement to leave all his property to her, the rules which govern actions for specific performance are rigidly applied. The successful prosecution of an action for dower by the wife is incompatible with the existence of such contract. *Conlon v. Mission of Immaculate Virgin*, 84 App. Div. 507; 82 N. Y. Supp. 998.

A wife who becomes an accommodation indorser on her husband's promissory note dated and payable in this state cannot, as against a *bona fide* holder in good faith, set up her inability to make such indorsement under the law of a foreign state where she resides. *Chemical National Bank v. Kellogg*, 183 N. Y. 92.

Where a husband deposits money in a savings bank in his own name and that of his wife, an intent to create a right of survivorship is presumed in the absence of evidence to the contrary. No such presumption exists where one deposits his money in his own name and that of a person not his wife. *West v. McCullough*, 123 App. Div. 846; 108 N. Y. Supp. 493; *affd.*, 194 N. Y. 518.

In an action by the wife against the personal representatives of her deceased husband to recover money received by her husband in the care and management of her property, items of credit for sums paid by the husband to the wife are not avoided by the fact that the wife used the moneys, when received, for support, clothing and household expenses. Such use will not create a liability on the part of the husband for the amount so expended without circumstances out of which may arise a promise to repay it to her. *Nostrand v. Ditmis*, 127 N. Y. 355.

But transactions between husband and wife affecting the rights of creditors are closely scrutinized.

Transactions between husband and wife as against creditors are scrutinized with care. *Saxton v. Sebring*, 96 App. Div. 570; 89 N. Y. Supp. 372; *Multz v. Price*; 91 App. Div. 116; 86 N. Y. Supp. 480.

A contract by a husband to pay his wife for household services is void, as against his creditors, and property transferred to the wife in pursuance thereof, and purchased by the wife with the avails of such contract, may be reached by creditors. *Conger v. Corey*, 39 App. Div. 241; 57 N. Y. Supp. 236.

The agreement of a wife with her husband to employ him

in the management of her separate business and to pay him a stipulated sum as compensation for his services, the wife also agreeing to pay the family expenses, is an agreement which she had a right to make, if she was solvent at the time, without committing a fraud as to her subsequent creditors. *Third Nat. Bank v. Guenther*, 123 N. Y. 568.

Where a husband in consideration of a reconciliation and the annulment of a decree of separation obtained by the wife assigned to his wife an interest in a legacy, the assignment will not be set aside on the suit of the husband's creditors. *Tisdale v. Rider*, 119 App. Div. 594, 104 N. Y. Supp. 77.

Although contracts between husband and wife to alter or dissolve the marriage are prohibited by the statute, an agreement by a husband to support his wife, made while they are living apart is not such a contract. (See ante pp. 105, 271.)

Under the present Married Woman's Act a husband living apart from his wife may make a contract directly with her for support and maintenance without the intervention of a trustee and she may recover thereon in a court of law. Such contract is not one altering or dissolving the marriage or relieving the husband from his liability for support. *Winter v. Winter*, 191 N. Y. 462.

A wife may enforce a separation agreement made while the parties were separated and pending actions for divorce, as it is not a contract relieving the husband from his liability to support his wife, within the meaning of the Domestic Relations Law. *France v. France*, 38 Misc. Rep. 459; 77 N. Y. Supp. 1015; affd. 79 App. Div. 291.

Section 51 of the Domestic Relations Law authorizing a married woman to contract with her husband in respect to her property, etc., does not validate a separation agreement made between husband and wife while they are living together. *Maney v. Maney*, 119 App. Div. 765; 104 N. Y. Supp. 541.

The rule that an executory contract between husband and wife in order to be enforced must be shown by the husband to have an adequate consideration, and utmost good faith in obtaining the same, only applies where the marital relations have not been disturbed and the parties are living upon terms of intimacy. Such rule does not apply to a contract between husband and wife where they have been living apart for a period of five years, when by such contract the wife agrees to pay a trustee a certain sum weekly for the support and maintenance of her husband. *Minor v. Parker*, 65 App. Div. 120; 72 N. Y. Supp. 549.

The contract between husband and wife to dissolve a marriage forbidden by the Domestic Relations Law need not be formal. The contract is void, if by collusion or connivance, there being a corrupt consent of one party to the commission of acts by the other which furnish cause for divorce. *Levine v. Klein*, 65 Misc. Rep. 498; 120 N. Y. Supp. 196.

A written contract delivered by a husband to his wife agreeing to pay her a certain sum semi-annually, in pursuance of an agreement by which he undertook to furnish her with proof of adultery on his part, in order that she might divorce him and marry another man, is void as against public policy. *Train v. Davidson*, 20 App. Div. 577; 47 N. Y. Supp. 239.

HUSBAND'S DUTY TO SUPPORT WIFE.

A husband must support his wife; but a wife owes no such duty towards her husband. The common law rule has not been changed by the Married Woman's Acts. Though as a married woman may now contract with third persons she may assume a personal liability.

Where husband and wife are living together the husband is *prima facie* liable for necessities purchased by the wife. But the liability is predicated upon the marriage.

As between husband and wife the primary obligation to provide for the support of the wife and children rests upon the husband. The wife is not bound to maintain her husband and children even though she may have a separate estate.

But if the wife applies her separate estate to the maintenance of her family under a valid agreement to that effect, equity will not enforce a claim for reimbursement out of her husband's estate. *Young v. Valentine*, 177 N. Y. 347.

The married woman's acts have not changed the common law duty of a husband to support his wife and family. He is *prima facie* liable for necessities furnished although the contract therefor is made by his wife. *Rahl v. Heintz*, 97 App. Div. 442; 89 N. Y. Supp. 1031.

It seems, that the authority of a wife to charge her husband with the price of necessities purchased by her in the absence of proof of her authority to do so, depends upon necessity as where the husband has deserted his wife or has by his conduct compelled her to live apart from him without properly providing for her support. *Wanamaker v. Weaver*, 176 N. Y. 75.

If a married woman living with her husband purchases necessities for the family it is presumed that she does so as his agent and that he alone is liable. But she may assume a personal liability by a special agreement, although she is living with her husband. *Valois v. Gardner*, 122 App. Div. 245; 106 N. Y. Supp. 808.

A judgment obtained by a husband annulling his marriage without alimony ends his common law obligation to support his wife. *Byrnes v. Byrnes*, 126 App. Div. 619; 111 N. Y. Supp. 72.

As to the effect of annulment, divorce, or separation upon the husband's obligation, see those titles.

Where a married woman who has a husband and children purchases groceries for family use, the presumption is, that the purchases were made by the wife, as the agent for the husband, and that he alone is liable for their amount; although a wife may, by an agreement to that effect, make herself personally liable for such necessities. *Lindholm v. Kane*, 92 Hun, 369, 71 N. Y. St. Repr. 579; 36 N. Y.

Supp. 665; citing *Winkler v. Schlager*, 64 Hun, 83; 45 N. Y. St. Repr. 507; 19 N. Y. Supp. 110; *Tiemeyer v. Turnquist*, 85 N. Y. 516.

A husband is legally bound to supply necessities to his wife so long as she does not violate her duty as his wife. *Cromwell v. Benjamin*, 41 Barb. 558; *Johnstone v. Allen*, 6 Abb. Pr. N. S. 306.

The statute enabling a married woman to contract as if sole does not absolve her husband from liability for her necessities. *Graham v. Schleimer*, 28 Misc. Rep. 535; 59 N. Y. Supp. 689.

A husband who without cause leaves his wife without means of support is liable for the reasonable value of her board; but her agreement to pay a certain sum is not conclusive upon him. *Sultan v. Misrahi*, 47 Misc. Rep. 655; 94 N. Y. Supp. 519.

Where a husband abandons and fails to support his wife and children, the wife has a right to bind his credit for all necessities for her own use and theirs. *Hardy v. Eagle*, 23 Misc. Rep. 441; 51 N. Y. Supp. 501; *affd.*, 25 Misc. Rep. 471; 54 N. Y. Supp. 1046.

A husband is liable for necessities furnished to his wife and minor children although he has made an agreement with adult daughters by which they are to furnish the necessities and they neglect to do so. *Wenz v. McCann*, 107 App. Div. 557; 95 N. Y. Supp. 462.

The husband living in voluntary separation from his wife may either trust her with a sufficient allowance to spend for herself, in which case he is not liable for her debts, or he must trust her to pledge his credit for what is necessary for her support, in which case he is liable. *Raymond v. Cowdrey*, 19 Misc. Rep. 34; 42 N. Y. Supp. 557.

The husband's liability for necessities furnished to the wife for her support rests entirely upon the ground of his neglect or default. *Supervisors, etc. v. Budlong*, 51 Barb. 493; *McCutcheon v. McGahey*, 11 Johns. 281.

Where a husband has been judicially declared incompetent and his wife appointed a committee with a provision for her support during incompetency, she cannot pledge his credit for necessities so as to bind him after incompetency is removed. *Thedford v. Reade*, 25 Misc. Rep. 490; 54 N. Y. Supp. 1007.

Money loaned to wife.

Where a husband abandons his wife and neglects to sup-

port her, he is liable for moneys loaned to her upon his credit for necessities. *Kenny v. Meislahn*, 69 App. Div. 572; 75 N. Y. Supp. 81.

It must be shown in an action to recover for necessities furnished to defendant's wife that they were supplied on his credit. *Ehrick v. Bucki*, 7 Misc. Rep. 118; 57 N. Y. St. Repr. 540, 27 N. Y. Supp. 247.

A husband cannot be held liable for money loaned to his wife, even though it be shown that the money was used for her support. *Schwarting v. Bisland*, 4 Misc. Rep. 534; 24 N. Y. Supp. 700.

Medical and legal services rendered to wife.

A husband is liable for medical services rendered to his wife in her last illness and his executor cannot recover the same from her estate. *Matter of Stadtmuller*, 110 App. Div. 76; 96 N. Y. Supp. 1101.

Although a husband has separated from his wife for sufficient cause, he is still liable for actual necessities furnished to her unless he has made adequate provision for her maintenance. Thus, he is liable for medical services rendered to the wife, although he notified the physician that he would not pay, if he made no further provision for medical attendance. *Button v. Weaver*, 87 App. Div. 224; 84 N. Y. Supp. 388.

Where the defense of a husband sued for the value of a physician's services in attending his wife was that she had deserted him without cause and was living apart from him, and the evidence tended to show that she left him because of his ill-treatment and with his consent, it was held that a dismissal of the complaint was error. *Comstock v. Green*, 88 Hun, 64; 68 N. Y. St. Repr. 650, 34 N. Y. Supp. 605.

A husband is liable to a physician, employed by him to attend his wife, for services to his wife continued after separation, if the employment is not revoked and there was no wrongful abandonment by her. *Potter v. Virgil*, 67 Barb. 578.

A husband is liable for the services of a nurse engaged by his wife during her confinement although they lived apart and he has paid her a weekly sum pending an action for separation. *Schneider v. Rosenbaum*, 52 Misc. Rep. 143; 101 N. Y. Supp. 529.

The reasonable value of the services of an attorney rendered in preparing papers in a suit for separation by a wife against her husband, necessary to be brought for her protection while she was living with him, but which papers were never served, the parties having become reconciled, may be recovered from the husband upon the ground of his wife's implied agency to bind him for necessities. *Langbien v. Schneider*, 27 Abb. N. C. 228.

Rent.

A wife residing with her husband in a rented house is not liable for the use and occupation unless she expressly assumed such liability by agreement with the lessor. *Grandy v. Hadcock*, 85 App. Div. 173; 83 N. Y. Supp. 90.

Funeral expenses.

A husband is under a legal obligation to pay the expenses of his wife's funeral but he may reimburse himself from her separate estate if she leaves one. *Watkins v. Brown*, 89 App. Div. 193; 85 N. Y. Supp. 820.

Where a wife's will provided that her funeral expenses be paid from her estate the executors of her husband who paid such expenses can recover from the wife's estate in the absence of proof showing an intent by him to make a gift of the moneys or an actual release of the claim. *Matter of Stadtmuller*, 110 App. Div. 76; 96 N. Y. Supp. 1101.

A husband who pays his wife's funeral expenses is entitled to reimbursement from her estate. *Pache v. Oppenheim*, 93 App. Div. 221; 87 N. Y. Supp. 704.

A husband who furnishes his wife with adequate support cannot be charged with necessities without proof that he authorized the purchases made by her. And this rule holds whether they be living together or apart.

A husband living with his wife who supplies her with necessities suitable to their position or who furnishes her with

money to pay for necessities is not liable for the value of necessities sold to her in the absence of affirmative proof that he gave her authority to make the purchases or subsequently ratified the same. The wife's agency is a question of fact, not a conclusion of law, to be drawn solely from the marital relation. *Wanamaker v. Weaver*, 176 N. Y. 75.

A husband who has allowed his wife sufficient money to supply her wants is not liable to a third person for necessities furnished. The same rule applies where a man lives with a woman in meretricious relations. *Oatman v. Watrous*, 120 App. Div. 66; 105 N. Y. Supp. 174.

A husband sued for wearing apparel furnished to his wife as necessities may show that she was already supplied with similar articles. *Lichtenstein Co. v. Peck*, 59 Misc. Rep. 193; 110 N. Y. Supp. 410.

One who paid a wife's debts pending negotiations concerning a separation agreement in reliance upon representations made by the husband's attorney without authority that he would be reimbursed therefor, cannot recover of the husband, as his liability was alone measured by the former agreement of separation. *Joseph v. Platt*, 130 App. Div. 478; 114 N. Y. Supp. 1065.

One who furnished necessities to a wife knowing that she is living apart from her husband cannot recover from the husband if he pays her more than one-half of his income. *Quinlan v. Westervelt*, 65 Misc. Rep. 547; 120 N. Y. Supp. 879.

If a husband and wife part by consent, and the husband secure to her a separate maintenance, suitable to his condition in life, and pay it according to agreement, he is not liable for articles furnished to his wife, and the general reputation of the separation will be sufficient to relieve him. *Baker v. Barney*, 8 Johns. 72; *Fenner v. Lewis*, 10 Johns. 38; *De Long v. Baker*, 9 Week. Dig. 315.

But, if no separate maintenance is provided for her, he is liable for her contracts for necessities furnished to her. *Lockwood v. Thomas*, 12 Johns. 248.

While a husband may revoke his wife's implied agency to purchase necessities by notifying tradesmen that he will not pay,

the notice is ineffectual if in fact he does not fulfill his duty to support her.

Ordinarily the husband is presumed to assent to such purchases by the wife as in the conduct of domestic concerns are proper for her management and supervision; but he is at liberty to withhold such assent, and destroy such presumption, by an express prohibition; and if he do so, no one having notice thereof, may trust the wife in reliance upon his credit, unless the husband so neglects his own duty, that supplies become absolutely necessary according to their condition. *Keller v. Phillips*, 39 N. Y. 351; *Cromwell v. Benjamin*, 41 Barb. 558.

Persons who sell goods to a wife upon the husband's account, after notice from him not to do so, cannot recover from him therefor, unless they show his subsequent promise to pay, or that the goods were necessary for the maintenance of the wife, and that she was not otherwise provided for by her husband. *Theriot v. Bagioli*, 9 Bosw. 578; *Mott v. Comstock*, 8 Wend. 544; *Kimball v. Keyes*, 11 Wend. 33.

The right of a wife to charge her husband for necessities is not revoked by separation without notice to the sellers who have previously dealt with the wife upon the husband's authority. *Anon.*, 21 Misc. Rep. 656; 48 N. Y. Supp. 277.

A husband is not liable for goods sold to a wife on her own credit, she now having power to contract. And this is so though they be necessities.

While, in the absence of any contract with the wife, the common-law liability of the husband for her suitable support still exists, if she avails herself of her power to contract, by making an express contract in her own name, even for her necessary support, she will not be deemed as acting as agent for her husband, nor will there be any implied agreement on his part to pay for such necessities. *Byrnes v. Rayner*, 84 Hun, 199; 65 N. Y. Repr. 742; 32 N. Y. Supp. 542. See also *Von Mallen v. Fuhrman*, 56 Hun, 402; 31 N. Y. St. Rep. 739, 9 N. Y. Supp. 201.

A husband is not liable for goods sold to a wife on her

credit although they were necessities. *Martin v. Oakes*, 42 Misc. Rep. 201; 85 N. Y. Supp. 387.

A husband cannot be held for necessities furnished to his wife from whom he had separated by mutual consent, where it appears that the credit was given to the wife with full knowledge that she was supporting herself. *Prickhardt v. Pratt*, 55 Misc. Rep. 231; 105 N. Y. Supp. 236.

It seems that since the Domestic Relations Law an action may be brought against a married woman for articles of clothing in the nature of necessities, although she has not expressly promised to pay therefor. *Mayer v. Lithauer*, 28 Misc. Rep. 171; 58 N. Y. Supp. 1064.

Where a married woman purchased jewelry which was charged to her on plaintiff's books, and accounts were rendered to her from time to time upon which she made payments, and the evidence showed that she had ordered the jewelry to be charged to her, it was held sufficient to bind her personally for the price thereof. *Dickinson v. Ensign*, 120 N. Y. 650; 31 N. Y. St. Repr. 651.

In an action against a married woman for plaintiff's services as a physician, her declaration to him at the time of employing him that she had personal property and was worth enough to pay him, was held sufficient to show that she had a separate estate and to sustain a verdict against her for such services. *Ellison v. Sessions*, 44 N. Y. St. Repr. 644; 18 N. Y. Supp. 108. But in the absence of a special agreement the husband would be liable for such services. *Estate of Shipman*, 22 Abb. N. C. 289. Where a married woman, who has a husband and children, purchases groceries for family use, the presumption is that the purchases were made by the wife as the agent of her husband, and that he alone is liable for their amount; although a wife may, by an agreement to that effect, make herself personally liable for such necessities. *Lindholm v. Kane*, 92 Hun, 369, citing *Winkler v. Schlager*, 64 Hun, 83; 45 N. Y. St. Repr. 507; 19 N. Y. Supp. 110; *Kegney v. Owens*, 18 N. Y. St. Repr. 482; 2 N. Y. Supp. 319; *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Hallock v. Bacon*, 45 N. Y. St. Repr. 484.

A married woman is liable for musical instructions given to her daughters and sheet music furnished at her request. *Muller v. Platt*, 31 Hun, 121.

A hotel-keeper may maintain a claim of lien on the property of the wife, for the board of husband and wife, by showing that she was the head of the family, the one trusted, and had money and credit, and her husband had none. *Birney v. Wheaton*, 2 How. Pr. N. S. 519.

A wife by her own fault may lose her right to support, as where she leaves her husband without just cause.

A husband is not liable for necessities furnished to a wife who abandoned him without just cause and refused to return, and a person suing to recover for necessities furnished must show that the separation was not due to the wife's fault. *Constable v. Rosener*, 82 App. Div. 155; 81 N. Y. Supp. 376, *affd.* 178 N. Y. 587.

Where a wife leaves her husband against his will and without justifiable cause, and goes to live with her parent, with whom she resides, if her husband is willing to maintain her in his own house, and does not promise to pay for her maintenance at her father's house, the father has no cause of action against the husband for his wife's board or for other necessities furnished to her. *Catlin v. Martin*, 69 N. Y. 393.

A husband is not liable for the board of his wife where she abandons him without just cause. *Ogle v. Dershem*, 91 App. Div. 551; 86 N. Y. Supp. 1101.

A wife living in adultery loses all right of support although her husband be also guilty. *Stimpson v. Wood*, L. R. (57 Q. B. Div.) 485. See also *Culley v. Charman*, L. R. (7 Q. B. Div.) 89.

In an action for necessities furnished to a wife living separate from her husband, the burden of proof is on the plaintiff to show that the separation was brought about by improper conduct on the part of the husband. *Blowers v. Sturtevant*, 4 Den. 46.

Mere inattention and negligence upon the part of a husband in providing for his wife, unaccompanied by physical violence or specific misconduct, does not justify her in abandoning him, or render him liable to third persons for necessities. There is no presumption of a continuing agency on the part of the wife for such necessities on her husband's credit after such abandonment, where the vendor never rendered any bills for necessities to the husband or received payment therefor. *Bostwick v. Brower*, 22 Misc. Rep. 709; 49 N. Y. Supp. 1046.

The presumption of the wife's authority to pledge the husband's credit is negatived by their living apart, and in such case a person

who supplied articles to the wife must not only show that they were necessities, but that, in consequence of the inadequacy of the husband's provision, they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse and her station in the community. *Bloomingtondale v. Brinckerhoff*, 2 Misc. Rep. 49; 49 N. Y. St. Repr. 142; 20 N. Y. Supp. 858.

A physician seeking to recover for medical services rendered to a wife who has separated from her husband must show that the separation was due to the husband's fault. In such action it is error to exclude evidence by the husband showing that his wife left him without cause. *Wolf v. Schulman*, 45 Misc. Rep. 418; 90 N. Y. Supp. 363.

One furnishing clothing to a married woman of independent means living apart from her husband and having no direct authority to pledge his credit, cannot recover of the husband in the absence of evidence that he has failed to supply her with clothing and other necessities within his means and suitable for her station in life. He does not become liable merely because he directed the bill to be sent to him. *Hass v. Brady*, 49 Misc. Rep. 235; 97 N. Y. Supp. 449.

The adultery of the husband justifies the wife in leaving him, and he is liable for necessities, although he offered to provide for her in a separate apartment of his residence. *Sykes v. Halstead*, 1 Sandf. 483.

Practice in actions to recover for necessities furnished: complaint, evidence, execution, bankruptcy, etc.

A complaint to recover for necessities furnished to a wife and for money advanced for her necessary expenses must allege the value of the necessities furnished and the amount of money advanced. *Sparks v. Ducas*, 123 App. Div. 507; 108 N. Y. Supp. 546.

As to the form of complaint in an action to recover for necessities furnished to a wife, see *Hatch v. Leonard*, 165 N. Y. 435.

One who furnishes necessities to a wife after her husband has abandoned her is not obliged to show in an action against the husband a demand that he support his wife and that he refused to do so. Nor is judgment in favor of the husband in a former action brought by the wife for abandonment conclusive evidence that he did not abandon her. *Hardy v. Eagle*, 25 Misc. Rep. 471; 54 N. Y. Supp. 1045.

A judgment in an action upon a judgment is not a judgment recovered wholly for necessities so as to authorize an execution against wages under section 1391 of the Code of Civil Procedure, although recovery in the original action was for necessities furnished. *Neuman v. Mortimer*, 98 App. Div. 64; 90 N. Y. Supp. 524.

A debt for goods purchased by a husband for his wife or children is discharged by bankruptcy. Section 17 of the Bankruptcy Act exempting liabilities for the maintenance or support of wife or child refers only to involuntary liabilities under the common law which makes a husband liable to one who furnishes a wife or child with necessities, etc. *Schellenberg v. Mullaney*, 112 App. Div. 384; 98 N. Y. Supp. 432.

One who furnishes necessities to a woman living with her husband cannot charge her as upon an account stated because she did not dispute accounts rendered. *Blendermann v. Wray*, 60 Misc. Rep. 117; 111 N. Y. Supp. 827.

WIFE'S RIGHT TO HER EARNINGS.

At common law a married woman could not conduct an independent business on her own account, or, at least if she did so, her earnings belonged to her husband.

But even before the present statute, if the husband agreed that his wife embark in business on her own account, or work for others, equity would protect her right to her earnings.

The statute allows a wife to carry on business on her own account, and enables her to sue for and recover her earnings, or wages, which belong solely to her, unless with the wife's consent there be an agreement to the contrary with the person for whom the wife works.

The presumption is that she works on her own account.

Domestic Relations Law. § 51 (in part). Powers of married woman.

*A married woman has all the rights * * * to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried.*

Domestic Relations Law. § 60. Married woman's right of action for wages.

A married woman shall have a cause of action in her own sole and separate right for all wages, salary, profits, compensation or other remuneration for which she may render work, labor or services, or which may be derived from any trade, business or occupation carried on by her, and her husband shall have no right of action therefor unless she or he with her knowledge and consent has otherwise expressly agreed with the person obligated to pay such wages, salary, profits, compensation or other remuneration. In any action or proceeding in which a married woman or her husband shall seek to recover wages, salary, profits, compensation or other remuneration for which such married woman has rendered work, labor or services or which was derived from any trade, business or occupation carried on by her or in which the loss of such wages, salary, profits, compensation or other remuneration shall be an item of damage claimed by a married woman or her husband, the presumption of law in all such cases shall be that such married woman is alone entitled thereto, unless the contrary expressly appears. This section shall not affect any right, cause of action or defense existing prior to May seventeenth, nineteen hundred and five.

Since at common law a married woman could not enter into any contract whatever, she could not bind herself as a *feme sole trader*, though as an exception she could do so by the custom of London. 15 Am. & Eng. Enc. 795.

But if her husband agreed that she do business as a sole trader, equity would protect her rights. *Tiffany, Dom. Rel.* 100, 111.

As a husband was entitled to his wife's personal property and services, he was entitled to her earnings. *Id.* 83.

Separate business carried on with husband's consent.

Where a married woman pursues an independent employment openly for six years without protest from her husband, there is an election to labor on her own account and she is entitled to her earnings. *Stevens v. Cunningham*, 181 N. Y. 454.

Where a wife renders services and furnishes meals to a stranger under an agreement made between herself and her husband that in case she renders such services and furnishes such meals she alone shall receive the compensation therefor, and that it shall become her separate property, the common-law rights of the husband to his wife's services are abrogated and she may enforce the claim in her own name and right. *Lashaw v. Croissant*, 88 Hun, 206; 68 N. Y. St. Repr. 395; 34 N. Y. Supp. 667.

While, ordinarily, where the wife lives with her husband and has no separate business, a claim for board in the family would belong to the husband, yet it has been determined that a contract between the husband and wife, by which he allows her to board a party and receive compensation therefor, is valid. *Sands v. Sparling*, 82 Hun, 401; 63 N. Y. St. Repr. 558; 31 N. Y. Supp. 251, citing *In re Kirimer*, 14 N. Y. St. Repr. 618; *Burley v. Barnhard*, 9 N. Y. St. Rep. 587; *Bowers v. Smith*, 28 N. Y. St. Repr. 346; 8 N. Y. Supp. 226.

A married woman who with the consent of her husband receives boarders in a house owned by her, is entitled to recover for board furnished, although her husband lived in the house and paid expenses. This is true, although the boarders paid her husband if such payments were made without authority from her. *Perry v. Blumenthal*, 119 App. Div. 663; 104 N. Y. Supp. 127.

Though section 21 of chapter 272, Laws of 1896, does not destroy the common-law unity of husband and wife, and the former is still entitled to the services of the wife, yet if the wife render services for

another with the consent of the husband, and payment is made to her therefor, the compensation belongs to her absolutely. The husband can forego his right to his wife's earnings, and unless done in fraud of creditors the property she acquires with his knowledge and consent, whether within the household or without, vests in her. *Carver v. Wagoner*, 51 App. Div. 47, 64 N. Y. Supp. 747.

Under chapter 90 of the Laws of 1860 and chapter 381 of the Laws of 1884, the earnings of a married woman for services rendered to a third party distinct from her common-law duties to her husband belong to her. *Stevens v. Cunningham*, 181 N. Y. 454.

Under the enabling statutes, if a married woman, with the knowledge of the husband, renders services to a third person, pursuant to a contract, for compensation, she may maintain an action to recover the price agreed or the value of the services. *Stokes v. Pease*, 79 Hun, 304; 60 N. Y. St. Repr. 863; 29 N. Y. Supp. 430; citing *Adams v. Curtis*, 4 Lans. 164; *Sheldon v. Button*, 5 Hun, 110; *Snow v. Cable*, 19 Hun, 280; *Rowe v. Comley*, 11 Daly, 317; *Matter of Kinmer & Gray*, 14 N. Y. St. Repr. 618. See also *Robinson v. Raynor*, 28 N. Y. 494.

Where a wife supports her husband, as in a case where she keeps a boarding-house upon her own account, an acknowledgment of indebtedness for the support by husband creates a valid obligation against his estate. *Matter of Hamilton*, 70 App. Div. 73; 75 N. Y. Supp. 66; *affd.*, 172 N. Y. 652.

Where services are rendered by a wife on her own account outside of her household duties, compensation therefor belongs to her. *Brooks v. Schwerin*, 54 N. Y. 343.

Liability of wife as sole trader.

The effect of the statute is to authorize a married woman to carry on business and enter into engagements in the course thereof, which shall be binding on her and her property generally. *Young v. Gori*, 13 Abb. Pr. 13; *Barton v. Beer*, 35 Barb. 78; 21 How. Pr. 309; *Klen v. Gibney*, 24 How. Pr. 31.

To create charge upon the property of a married woman on account of a debt created in the course of her separate business, it is not necessary that any written instrument should be executed. *Cohen v. O'Connor*, 5 Daly, 28; *affirmed* 56 N. Y. 613.

If such separate business is carried on through an agent,

she is liable for the acts of the agent as if she were unmarried. *Bodine v. Killeen*, 53 N. Y. 93.

See further, *Debts of Husband and Wife*, post, p. 297.

Purpose of statute.

Section 30 of chapter 289 of the Laws of 1902 amending the Domestic Relations Law as to a married woman's right of action for wages was not designed to make a further change in the common law, but to codify the decisions construing the former statute. While the Married Woman's Acts do not absolve a wife from her duty to render services to her husband, they enable her to sue in her own name and for her own benefit to recover for services rendered to third persons. *Stevens v. Cunningham*, 181 N. Y. 454.

The legislation in this state upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not by express provision nor by implication deprived the husband of his common-law right to avail himself of a profit or benefit from the services of his wife. *Porter v. Dunn*, 131 N. Y. 314. In this case it appeared that the defendant's testator in his lifetime hired a room in the plaintiff's house, took his meals in the plaintiff's restaurant, and was nursed in his illness by plaintiff's wife in connection with her household duties, she having no separate business, and procuring the money expended for the testator's benefit from her husband; it was held that the husband was entitled to recover for the wife's services to the testator.

The legislation of this state upon the subject of the rights of married women has only changed their common-law status to the extent set forth in the various statutes; they have not deprived the husband of his common-law right to avail himself of a profit or benefit from the services of his wife. *Porter v. Dunn*, 131 N. Y. 314.

While under the statute a wife is entitled to her earnings as a

sole trader, and to wages received from third persons, she is not entitled to compensation for services rendered to her husband.

"The wife's obligation apart from statute to render family services is coextensive with her husband's obligation to support her." 15 Am. & Eng. Enc. 813.

In the case of *Blaechinski v. Howard Mission*, 130 N. Y. 497, the court says: "The enabling statutes do not relieve a wife of the duty of rendering services to her husband. While they give her the benefit of what she earns, under her own contracts, by labor performed for any one except her husband, her common-law duty to him remains. * * * Such services as she does render him, whether within or without the strict line of her duty, belong to him. If he pays her for them, it is a gift. If he promises to pay her a certain sum for them, it is a promise to make her a gift of that sum. She cannot enforce such a promise by a suit against him."

The common-law right of a husband to the services and earnings of his wife, when not received or rendered upon her sole and separate account, is not affected by chapter 381 of the Laws of 1884, and where such services were rendered by a married woman, while living with her husband, under a contract made by him, an action to recover thereon may be brought in his name. *Holcomb v. Harris*, 166 N. Y. 257.

Since the Married Woman's Acts, while a husband is entitled to the services of his wife she is under no duty to render services to third persons or to carry on a business in the husband's house for his benefit. *Stevens v. Cunningham*, 181 N. Y. 454.

A wife who takes charge of her husband's house in which he receives boarders, cannot recover for board furnished, as her services belong to her husband. *Contra*, if the husband agrees that she shall receive recompense for services rendered. *Briggs v. Devoe*, 89 App. Div. 115; 84 N. Y. Supp. 1063.

Where an attorney employs a woman as a clerk for so long a time as he practices law, payment not to be made until he retires from practice, and the parties are subsequently married, the contract was merged. A husband, after that event, is entitled to her services, and she cannot recover for such as are rendered during the period of the married relation. Such a contract is not properly within the meaning of the Act of 1848, which continues the woman's separate property after marriage. This act does not save from extinguishment by a marriage of the parties, the contract relating solely to personal services to be rendered by the woman for the man for a consideration named. *Matter of Callister*, 153 N. Y. 294.

In *Coleman v. Burr*, 93 N. Y. 17, 25, the court remarks: "Whatever services a wife renders in her home for her husband cannot be on her sole and separate account. They are rendered on her husband's account in the discharge of a duty which she owes him or his family, or in the discharge of a duty which he owes to the members of his household. See also *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 47; *Whitaker v. Whitaker*, 52 N. Y. 368; *Birkbeck v. Ackroyd*, 74 N. Y. 356.

The wife is not enabled by these acts to make a binding contract with her husband for services having no connection with her separate business and estate, although the same are to be rendered outside of her household duties. While he cannot require her to perform services to him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift and so is not enforceable. *Blaechinska v. Howard Mission and Home*, 130 N. Y. 497, citing *Reynolds v. Robinson*, 64 N. Y. 589; *Coleman v. Burr*, 93 N. Y. 17; *Whitaker v. Whitaker*, 52 N. Y. 368.

The right to recover for board furnished to a person in a husband's household belongs to the husband and not to the wife, where the expenses of the household are borne by him. *Stamp v. Franklin*, 144 N. Y. 607; *Birkbeck v. Ackroyd*, 74 N. Y. 356; *Farrell v. Harrison*, 14 Misc. Rep. 462; 70 N. Y. St. Repr. 733; 35 N. Y. Supp. 1029.

Where a wife is engaged in no separate business or services on her own account and renders services to another person in her husband's household by a contract with such person, the services rendered belong to her husband. *Reynolds v. Robinson*, 64 N. Y. 589.

Partnerships between husband and wife.

In the case of *Suau v. Caffé*, 122 N. Y. 308, it was held that the common-law disability of a married woman to engage in business as a copartner or jointly with her husband was removed by the provisions of the act of 1860, authorizing a married woman to carry on any trade or business on her sole and separate account, and that, therefore, when a husband and wife assume to carry on a business as copartners and contract debts in the course of it, the wife cannot escape liability on the ground of coverture.

HUSBAND AND WIFE AS AGENTS.

The marital relation of itself creates no agency as between husband and wife. As to the wife's right to charge her husband with necessaries as agent by necessity, see, *Husband's duty to support wife*, ante, p. 277.

The marital relation alone creates no presumption that a wife is agent for her husband. Her agency is a question of fact and may arise either from his neglect to supply her with necessaries or from authority expressly given or fairly inferable from the circumstances. *Martin v. Oakes*, 42 Misc. Rep. 201; 85 N. Y. Supp. 387.

No authority in the husband as agent of his wife can be inferred from the relationship. If anything, greater care in ascertaining the precise limits of his authority is required. *Smith v. Fellows*, 41 N. Y. Super. Ct. 36; *Allen v. Williamsburg Bk.*, 2 Abb. N. C. 342; *Hoffman v. Treadwell*, 2 T. & C. 57; *Valentine v. Applebee*, 87 Hun, 1; 67 N. Y. St. Repr. 509; 33 N. Y. Supp. 762.

The question of the husband's agency is a question for the jury. *Cutter v. Morris*, 116 N. Y. 310; *Farmilo v. Stiles*, 52 Hun, 450; 24 N. Y. St. Repr. 377; 5 N. Y. Supp. 579.

Marriage does not create a husband an agent for his wife.

Proof of his appointment as agent or ratification is necessary to bind her. *Aarons v. Klein*, 29 Misc. 639; 61 N. Y. Supp. 119.

A husband as such has no authority to bind his wife by a promise to pay an attorney acting for her a certain percentage of the recovery. *Sciolaro v. Asch*, 122 N. Y. Supp. 518.

A declaration by a husband that he was agent for his wife is not sufficient evidence of his authority to charge her. *Wolfe v. Benedict*, 48 N. Y. St. Repr. 195; 20 N. Y. Supp. 585; *O'Callaghan v. Barrett*, 50 N. Y. St. Repr. 166; 21 N. Y. Supp. 368. But the question of agency may be determined by the declaration of the husband and the wife, and by their acts and conduct in respect to the transaction. *Matter of Zinke*, 90 Hun, 127; 70 N. Y. St. Repr. 509; 25 N. Y. Supp. 645. In this case it was held that the husband could maintain an action to establish a claim against his wife's estate for services performed by him as her agent in respect to her separate estate.

The implied agency of a husband to act for and bind his wife, which is inferred from his possession of her mortgage of her property, must have respect to and be limited by the terms of that instrument. *Bank of Albion v. Burns*, 46 N. Y. 170.

Facts establishing agency.

A married woman may be held liable for the services of an attorney employed by her husband if he was generally authorized to collect demands arising from her separate estate. *Owen v. Cawley*, 36 N. Y. 600.

If a husband makes a contract in his own name for the erection of a building upon a piece of land owned by his wife, and the price be paid from moneys raised by her by means of an incumbrance upon the land, and before completion the wife leases the property, agreeing to finish the building substantially as described in the building contract, the contract may be regarded as being made by the husband as the wife's agent, and she would be liable to the husband for the amount due upon the contract. *Fowler v. Seaman*, 40 N. Y. 592.

Where a married woman owns a farm and her husband who has no property, carries on the farm by her permission, he is her agent none the less because she gives him unlimited authority to do as he pleases, she is engaged in the business of farming, and her estate is subject to the debts contracted by him in pursuing her business. *Smith v. Kennedy*, 13 Hun, 9.

A husband who takes general care and management of his wife's property may charge her with the payment of bills for repairs thereon without special authority. *Armstrong v. Jones*, 10 Week. Dig. 144.

Where a husband, with fraudulent intent, obtained a power of attorney from his wife to carry on business in her name, and in that business bought goods on credit, sold them at less than cost, and finally induced the wife to make an assignment, she having no knowledge of the fraud; it was held that the wife was legally responsible for the frauds committed by her husband as her agent, and the assignment was void. *Warner v. Warner*, 46 N. Y. 228.

For facts sufficient to charge a wife as the undisclosed principal of her husband, see *Whipple v. Webb*, 44 Misc. Rep. 332; 89 N. Y. Supp. 900.

Notice to the husband as the wife's agent is notice to the wife. *Brumfield v. Boutall*, 24 Hun, 451; *Hensler v. Sefrin*, 19 Hun, 564, citing *Adams v. Mills*, 60 N. Y. 533, 539.

Facts not showing agency.

The possession by a husband of authority to buy land in his wife's name, and with her money, does not include power to bind her personally to assume payment of the mortgage debt. *Blass v. Terry*, 156 N. Y. 122.

Authority of the husband to make a contract for his wife does not confer authority to cancel or surrender it. *Stilwell v. Mutal Life Ins. Co.*, 72 N. Y. 385.

If a husband employs another to work on his own houses and those of his wife, without disclosing his agency, the person employed having no knowledge of the separate ownership, the wife's liability is not thereby enlarged. She is liable only for work performed on her own houses. *Newell v. Roberts*, 54 N. Y. 677.

Although a married woman is liable for fraud committed by her husband while acting as her agent, yet, where he is not so acting, and she does not participate as an actor and is not profited by the act, she is not liable simply by reason of prior assent, advice, or authorization on her part. *Vanneman v. Powers*, 56 N. Y. 39.

A married woman is not chargeable either in law or in equity for improvements made on her separate estate, under contracts made by her husband therefor, where no fraud imputable to her has induced the person contracting with her husband, to make them. *Ainsley v. Mead*, 3 Lans. 116. But see *Colvin v. Currier*, 22 Barb. 371.

For facts insufficient to establish the agency of a husband so as to charge the wife with the value of goods ordered by him, see *Dillon v. Mandelbaum*, 97 App. Div. 107, 89 N. Y. Supp. 646.

Estoppel.

Where the wife, having a separate estate, is represented by her husband, his knowledge and fraud becomes hers by imputation. *Du Flon v. Powers*, 14 Abb. Pr. N. S. 391; *Baum v. Mullen*, 47 N. Y. 577.

A married woman who receives and retains the fruits of a contract made by her husband, as her agent, in reference to her separate property, is liable in an action for damages for his deceit in making the contract. *Graves v. Spier*, 58 Barb. 349.

The wife is liable for a debt contracted by her husband in making repairs upon a house owned by her, if she knowingly permitted them to be made. *Miller v. Hunt*, 1 Hun, 491; 3 T. & C. 762.

It is not within the authority of a husband acting as his wife's agent in the construction of houses, to adjust the amount due to persons who have furnished materials therefor, solely for the purpose of allowing such persons to assign their claims to a third person, and the wife is not estopped by such adjustment from questioning the actual amount due as against the assignee of the claims. *Parker v. Collins*, 127 N. Y. 185, citing *Bickford v. Menier*, 107 N. Y. 490.

DEBTS OF HUSBAND AND WIFE.

At common law a husband was liable for his wife's ante-nuptial debts, whether or no he acquired a fortune from her by marriage. But if the debt were not recovered during coverture, his estate was discharged from liability, and she was liable.

He, of course, was liable for her debts contracted during coverture.

The statute measures his liability for his wife's ante-nuptial debts by the property he acquires from her by marriage; but he acquires nothing, save as she may make a settlement upon him, or (possibly) as he may take as tenant by the courtesy.

The wife, of course, is not liable for her husband's debts.

Domestic Relations Law. § 54. Liability of husband for ante-nuptial debts.

A husband who acquires property of his wife by ante-nuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired.

Domestic Relations Law. § 55. Contract of married woman not to bind husband.

A contract made by a married woman does not bind her husband or his property.

Domestic Relations Law. §50. Property of married woman.

*Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her * * * shall not be subject to her husband's control or disposal nor liable for his debts.*

"If the wife be indebted before marriage the husband is bound afterwards to pay the debt, for he has adopted her and her circumstance together." 1 Bl. Com. 443.

"So the husband shall be charged for all debts of his wife *dum sola*." Comyn's Digest, Baron and Feme, N.

"The husband is answerable for the wife's debts before coverture; but if they are not recovered during the coverture he is discharged." 1 Kent. Com. 143.

"Courts of equity have held that they could not vary the rule whether the husband had, or had not, received a portion with his wife, or charge his conscience in one case more than in the other. * * * If the husband dies before the debts are collected, his representatives are not liable. * * * The wife remains liable after her husband's death." 2 Kent Com. 144.

Husband's debts.

A wife does not, by employing her husband to carry on a farm, which is her separate property, render its profits, or chattels purchased by her to be used by her in connection with it, liable for his debts. *Vrooman v. Griffiths*, 4 Abb. Ct. of App. Dec. 505; 1 Keyes, 53. See also *Abbey v. Deyo*, 44 N. Y. 343; *Buckley v. Wells*, 33 N. Y. 518.

The produce and proceeds of the wife's separate estate upon which the husband and wife both live, and which he cultivates, are not liable to the husband's creditors, except where the transaction between the husband and wife is shown to be a colorable device to cheat his creditors. *Gage v. Dauchy*, 34 N. Y. 293.

A wife is not liable for medical services rendered to her husband and his family unless she expressly agreed to pay. *Hazard v. Potts*, 40 Misc. Rep. 365; 82 N. Y. Supp. 246.

INSURANCE ON HUSBAND'S LIFE.

A married woman in her own name, or in that of another as trustee, may take insurance on her husband's life. If she survived the term of the insurance, the proceeds are her separate property, free from claims of her husband's creditors.

But if the premium be paid from his property all insurance purchased by a sum in excess of \$500 annually is primarily liable for his debts.

When the wife receives the proceeds of such policy they are liable for her debts, but not before.

The wife may make her husband and children beneficiaries on the happening of certain contingencies. She may dispose of the policy by an instrument to take effect at her death.

Domestic Relations Law. § 52 (in part). Insurance of husband's life.

A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendants surviving.

After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely.

The statute relating to life insurance issued for the benefit of a married woman refers only to a contract made by her in her own name or in the name of a third person as her trustee, for insurance upon the life of her husband. It has no application where the husband takes out insurance for the wife's benefit. *Bradshaw v. Mutual Life Ins. Co.*, 187 N. Y. 347.

The proceeds of a policy taken out by a wife on her husband's life, and payable to her, her executors, administrators or assigns, belong to her estate although she dies before her husband. *Pool v. New England Life Ins. Co.*, 123 App. Div. 885; 108 N. Y. Supp. 431.

A wife to whom insurance upon the life of her husband has been directly issued acquires a vested interest therein upon its delivery to the husband even though he negotiated the policy as her agent, kept it in his possession and paid all the premiums. On the death of the wife prior to her husband the proceeds of the policy pass under her will and the executors of the husband at his death are at the most only entitled to the amount of the premiums paid after the death of the wife. *Bradshaw v. Mutual Life Ins. Co.*, 127 App. Div. 817, 112 N. Y. Supp. 107.

Debts of husband.

Although the statute provides that such insurance on the life of a husband as is purchased by a premium in excess of \$500 is primarily liable for his debts, the excess forms no part of the husband's estate until the other assets have been exhausted and the wife is entitled to the whole premium until it is ascertained that the other assets are not sufficient to satisfy creditors. A surrogate has no jurisdiction to determine that the excess proceeds of such policy are chargeable

with a lien in favor of creditors, and such lien can only be enforced in an action after the other assets of the estate have been exhausted. *Matter of Thompson*, 184 N. Y. 36.

The wife is not to be deprived of any portion of insurance on her husband's life purchased by a premium in excess of \$500 until it be ascertained by an administration of the estate that the other assets are not sufficient to satisfy the claims of creditors. But until the claims of creditors are discharged they are a lien upon so much of the insurance as was purchased by the excess of premium over \$500. *Kittel v. Domeyer*, 175 N. Y. 205.

A wife's right as against her husband's creditors to insurance purchased by a premium of \$500 does not rest upon contract but upon the statute exempting that amount of insurance. The wife's right is contingent upon her surviving her husband; the statute relates to the remedy and hence, is applicable to policies issued before its enactment. *Kittel v. Domeyer*, 175 N. Y. 205.

Under section 52 of the Domestic Relations Law providing that insurance on a husband's life purchased by an annual premium in excess of \$500 is primarily liable for the husband's debts, the premiums upon a policy assigned by a wife and her husband before his death to secure a debt due from the husband should not be considered as part of the \$500 or be charged against the wife in determining the amount of insurance to which she is entitled. *Kittel v. Domeyer*, 175 N. Y. 205.

Rights of creditors of wife.

Money due of a wife upon an ordinary insurance policy on the life of a husband at its maturity, is liable for the debts of the wife and is subject to levy under a warrant of attachment against her. It is not exempt under section 52 of the Domestic Relations Law. The statute exempts the pro-

ceeds of such policies purchased with a premium of \$500 from the husband's creditors but not from the claims of the wife's creditors. *Amberg v. Manhattan Life Ins. Co.*, 171 N. Y. 314.

An insurance policy on the life of any person for the benefit of a wife can only be assigned with the written consent of the assured.

Domestic Relations Law. § 52 (in part).

A policy of insurance on the life of any person for the benefit of a married woman is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured.

Prior to the Enabling Act of 1879, chap. 248, a married woman who had a child, or any issue of a child, living, had no power to assign a policy of insurance upon the life of her husband, for her benefit, during the life of her husband. *Brick v. Campbell*, 122 N. Y. 337. But the Act of 1879 authorized such an assignment with the written consent of her husband.

Under the former law (Laws of 1879, chap. 248), only policies held by married women on the lives of their husbands could be assigned. Under the above section such policies on the lives of any person may be assigned.

The intent of the statute of 1840, and also of the present statute, was to make policies of insurance upon the life of a husband in favor of his wife, a security to the family of a married man and a provision for their use and benefit. *Eadie v. Slimmon*, 26 N. Y. 9, 15.

A wife who by the terms of an insurance policy on her husband's life is entitled to the proceeds only in case she survives him, cannot assign the same without the consent of her husband so as to vest a title in the assignee to the

surrender value of the policy. *Rathborn v. Hatch*, 90 App. Div. 161; 85 N. Y. Supp. 775; *affd.* without opinion, 181 N. Y. 584.

The statute requiring the written consent of the husband to an assignment by his wife of a policy on the husband's life is satisfied where the husband contemporaneously with the assignment by the wife and as part of the same transaction made a separate assignment on the same sheet of paper containing the assignment from the wife. *Sherman v. Allison*, 77 App. Div. 49; 80 N. Y. Supp. 148; *affd.* 177 N. Y. 574.

To bring an insurance by a wife upon the life of her husband within the provisions of the statute, it need not appear, either by the terms of the policy or by extrinsic evidence, that it was the intention of the assured to avail himself of the provisions of that act; the intention is to be presumed from the beneficial nature of the policy. *Brummer v. Cohn*, 86 N. Y. 11; *Brick v. Campbell*, 122 N. Y. 337.

The common-law right of survivorship in the husband in case of an insurance on his life in favor of his wife was not affected by these statutes. *Olmstead v. Keyes*, 85 N. Y. 593.

The statute authorizes an assignment to be executed when accompanied by a written assent on the part of the husband. *Anderson v. Goldsmidt*, 103 N. Y. 617.

An endowment policy is non-assignable during its term, but when the term expires and the policy becomes payable to the husband, a formal assignment executed by husband and wife will become operative and vest the right to the insurance moneys in the assignee. *Miller v. Campbell*, 140 N. Y. 457, citing *Brummer v. Cohn*, 86 N. Y. 11.

An assignment of a policy in which the wife is the beneficiary is valid where the assignment is made by the wife with the written consent of her husband, although the assignee has no interest in the life of the husband and merely takes the assignment upon an agreement that he shall have a two-thirds interest in the policy, provided he pays the premium upon it and prevents it from lapsing. *Fuller v. Kent*, 13 App. Div. 529; 43 N. Y. Supp. 649.

Assignment prior to statute.

Where an assignment of a policy was made prior to the passage of chapter 248 of the Laws of 1879, it is invalid, notwithstanding the passage of such act. *Brick v. Campbell*, 122 N. Y. 337; *Miller v. Campbell*, 140 N. Y. 457.

The ratification and recognition of an assignment of such a policy made prior to the passage of the Act of 1879, after the passage of such act, is equivalent to a prior authority and sufficient to confirm the title of the assignee to the extent of payments made for the purpose of keeping the policy alive. *Conn. Mut. Life Ins. Co. v. Van Campen*, 32 N. Y. St. Repr. 1125; 11 N. Y. Supp. 103.

Policies taken in other states.

In the case of *Spencer v. Myers*, 73 Hun, 274; 58 N. Y. St. Repr. 70; 20 N. Y. Supp. 371; it is held that the statute of 1879, which was repealed and re-enacted by chapter 272 of the Laws of 1896, applied not only to policies actually made and delivered within the state, but also to policies made outside of the state. Affirmed 150 N. Y. 269.

The question of the validity of such an assignment is not affected by the fact that the policy was issued by an insurance company of another state, although the laws of that state might authorize such an assignment. *Miller v. Campbell*, 140 N. Y. 457.

Policy not originally payable to wife.

Nothing short of the written consent of a husband to an assignment by his wife of an insurance policy upon his life for her benefit will amount to a compliance with chapter 248 of the Laws of 1879. But a policy payable to the legal representatives of the insured cannot be regarded as one for the benefit and use of the wife within the meaning of the statute. Therefore, such policy may be assigned by the wife without the written consent of the husband, as well as a paid-up policy taken by her in lieu of the original policy payable to the husband's representatives, the latter being merely a continuation of the original. *Dannhauser v. Wallenstein*, 169 N. Y. 199; reversing 52 App. Div. 312; 65 N. Y. Supp. 219.

Where a husband having an insurance policy payable to his representatives, assigned the same to his wife and her administrator subsequently surrendered the policy and re-

ceived a paid-up policy therefor, the assignment of such paid-up policy by the administrator does not require the consent of the husband under Laws of 1879, chapter 248, because the original policy was not issued for the benefit of the wife. *Morschauser v. Pierce*, 64 App. Div. 558; 72 N. Y. Supp. 328.

Where a policy of insurance payable to the wife of the insured, if alive at his death, or in case she is dead then to their children, which policy contained an option that after certain premiums are paid it may be converted into cash, at the option of the holder, it was held that the contingent interests of the wife and children in the policy were subject to the insured's right to convert the policy into cash, and that therefore the provisions of chapter 248, Laws of 1879, providing that insurance on lives of husbands for the benefit or use of wives shall be assignable by the wife with the written consent of the husband, did not apply or require a written consent of the wife to the transfer by the husband of his interest, and that an assignment by the husband was valid. *Travellers Insurance Co. v. Healey*, 25 App. Div. 53; 49 N. Y. Supp. 29; affirmed on opinion below, 164 N. Y. 607.

Avoiding assignment.

Only the wife or her personal representatives can avoid the assignment of a policy made contrary to the provisions of this section. *Smillie v. Quinn*, 90 N. Y. 492.

An assignment of such a policy made prior to the passage of the Enabling Acts of 1873 and 1879, is voidable by the wife at her option although the premiums on the policy were paid by her out of her separate estate. *Frank v. Mutual Life Ins. Co.*, 102 N. Y. 266.

Where a husband and wife are reconciled after a separation agreement, their mutual rights in each other's property is restored. Thus, where in consideration of a separation agreement a wife assigns to

her husband her interest in a policy on his life, the assignment is avoided by a subsequent reconciliation if the rights of no third parties have intervened. An assignment by a wife to her husband of her interest in a policy on his life in consideration of a separation agreement is void under section 52 of the Domestic Relations Law unless the insured consented thereto in writing. *Dudley v. Fifth Avenue Trust Co.*, 115 App. Div. 396; 100 N. Y. Supp. 934; *affd.* without opinion, 188 N. Y. 565.

Beneficiaries named in a life insurance policy, without a reserved power of revocation, acquire vested rights therein of which they cannot be deprived except by their own act. Hence an assignment by husband and wife is void as against children, named as contingent beneficiaries, who did not join in the assignment if the contingency happens. But the assignee has an equitable lien for sums expended in keeping the policy alive.

Where a husband procures a policy of insurance upon his life for the benefit of his wife, or in case of her death before his, of their children, he acts simply as their agent in procuring it and in doing whatever is necessary to perfect and continue the rights of the assured. They acquire a vested interest in the policy at the moment of its delivery, and the fact that they did not know of its existence until after his death is immaterial. The beneficiaries acquire their ownership irrespective of the question as to whether the policy has been actually delivered to them. *Whitehead v. N. Y. Life Ins. Co.*, 102 N. Y. 143.

A direction by the husband for the payment of an endowment policy upon his life, to his wife, in the event of his death before its maturity, vests the latter with an interest which the husband cannot divest without her consent. *Fowler v. Butterly*, 78 N. Y. 68.

A policy payable to the insured at the end of a certain number of years, or in case of his earlier death to his wife, gives her a direct interest which is not defeated by an assignment made by her husband, nor by an assignment to which

her signature is obtained by compulsion. *Geraty v. Reid*, 78 N. Y. 64.

Where an endowment policy on a husband's life is made payable, in case of his death before a specified time to his wife, and if he survives the period, to him, neither the husband nor wife during the period has an exclusive interest in the contract, and neither can demand payment of its value, or receipt for or discharge such value. *Newcomb v. Almy*, 96 N. Y. 308.

Where a husband procures a life policy, payable to his wife, and afterwards exchanges it for a paid-up policy, which he subsequently surrenders to the insurance company, upon receiving a certificate for its value, and the wife knows nothing of these transactions until after his death, she may, upon learning the facts, ratify his acts in procuring the first policy and repudiate his surrender of the latter, and compel the company to pay the same to her, notwithstanding payment of the certificate to a person to whom the husband had assigned it. *People v. Globe Mutual Life Ins. Co.*, 15 Abb. N. C. 75.

Rights of beneficiaries not joining in assignment.

A policy of life insurance must be regarded as a contract made between the insurer and the insured for the benefit of a person named as beneficiary therein, and the rights of the beneficiaries do not depend upon any privity between them and the assured, but rest in contract, and are capable of being enforced as other contracts and stand where at the maturity of the policy the contract leaves them. Where a policy is made payable in case of the death of the insured to his wife or, if she be not then living, to his children, the assignment of the policy by the wife of the insured prior to the death of the insured would in no way affect the rights of his children. The authority contained in the statute for a wife to assign a policy of life insurance with the written consent of her husband does not authorize her to assign the interest which by the express terms of the policy, is reserved to her children.

Travellers Ins. Co. v. Healey, 86 Hun, 524; 67 N. Y. St. Repr. 686; 33 N. Y. Supp. 911.

But the mere fact that the wife has children at the time of assignment does not make such assignment void, even though they have a contingent interest which may become vested by her death before the policy matures. If she survives the maturity the contingent interest of the children is ended. *Anderson v. Goldsmidt*, 103 N. Y. 617.

Equitable rights of assignee.

Where a wife as beneficiary in a policy on her husband's life assigns the same with his consent to a third person who at the request of the beneficiary and for her benefit pays premiums to keep the policy alive, he acquires an equitable interest in the proceeds to reimburse him. This is true, although the wife died before her husband and the policy by its terms became payable to her children so as to make the assignment ineffective as against them. *Morgan v. Mutual Benefit Insurance Co.*, 132 App. Div. 455; 116 N. Y. Supp. 989; *affd.* 197 N. Y. 607.

Where a husband taking insurance on his own life makes his wife a beneficiary, her rights are measured by the terms of the policy, and are subject to the equities between the insured and the insurer.

Where an endowment policy upon the life of a husband provided that in case the husband survived the term of fifteen years, the sum insured should be paid to him, and the husband survived the policy period, the interest of the wife in the policy ceased upon the expiration of that period, and the whole interest vested in the husband. *Miller v. Campbell*, 140 N. Y. 457.

Where a husband takes an insurance policy on his own life payable to his wife at his death if living, if not, to the children, the wife can only dispose of the policy by will if she

survives her husband. If she die without issue before her husband, the proceeds pass not to her estate but to that of her husband. *Bradshaw v. Mutual Life Ins. Co.*, 187 N. Y. 347.

A wife, in whose favor a policy of insurance has been written upon the life of her husband, but without her knowledge, cannot claim the benefit thereof, without at the same time assuming all the responsibilities for a failure to perform all its essential conditions, and she is bound by a failure to pay a premium thereon, notice of which was duly given, although, before the time when payment became due, a surrender of the policy was accepted by the company, and its cash value paid the husband upon the presentation of a forged consent of the wife, the company acting in good faith and without fault or negligence. *Schneider v. U. S. Life Ins. Co.*, 123 N. Y. 109.

An insurance policy on the life of a husband payable to his wife, if she survive him, but in case she dies first then to her children, vests in the children on the death of the wife during the lifetime of the insured. The children take not through their mother, but as substituted beneficiaries under the terms of the contract. *Fidelity Trust Co. v. Marshall*, 178 N. Y. 468.

If an applicant for an accident insurance policy falsely states that the beneficiary named by him is his wife, there is a breach of warranty which precludes a recovery on the policy. *Gaines v. Fidelity and Casualty Co.*, 188 N. Y. 411.

PERSONAL RIGHTS OF HUSBAND.

The husband, in theory, still remains the head of his family under the Married Woman's Acts.

He may determine the matrimonial domicile, though the wife may obtain another for purposes of divorce, etc. (See ante, p. 80.)

At common law he could moderately correct his wife and restrain her of her liberty for cause, but these rights are not countenanced in our more perfected civilization.

He is entitled to her services in the sense that she cannot sue him for services rendered, though she may render services to others and the proceeds are her sole property.

The common law maintained that a husband is the head of the family and as such the wife must love, honor and obey, him, which right is said not to be altered by statutes conferring increased property rights on married women. (See, 15 Am. & Eng. Enc., 811)

The husband as the head of the family has the right to fix the matrimonial domicile without the consent of the wife and she is bound to follow him when he changes his residence provided the change be made by him in a *bona fide* exercise of his power. 15 Am. & Eng. Enc., 812.

But the husband cannot compel her to live with him. The action for restitution of marital rights no longer obtains.

A married woman who has lived for many years with her husband in another state cannot acquire a separate legal residence here unless she has grounds for a separation or divorce. Where she leaves her husband and dies in this state, distribution of her estate will be made as if she were a resident of the foreign state. *Matter of Bushbey*, 59 Misc. Rep. 317; 112 N. Y. Supp. 262.

Chastisement and restraint.

"The husband also by the old law might give his wife moderate correction, for as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children. * * * But this power of correction was confined within reasonable bounds and the husband was prohibited from using any violence to his wife." "But," says the learned commentator, "with us in the politer reign of Charles, the second, this power of correction began to be doubted and a wife may now have reasonable security of the peace against her husband or in return a husband against his wife. Yet the lower rank of people who were always fond of the old common law still claim and exert their

ancient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty in case of any gross misbehaviour". 1 Bl. Com. 444.

"But," says the annotator, "this degrading doctrine so fondly adhered to has never been countenanced for a moment by the American Law." 1 Bl. Com. Lewis's ed. 445, note, citing *People v. Winters*, 2 Park. Crim. 10; *Commonwealth v. McAfee*, 108 Mass. 458.

And it was held by the Supreme Court of North Carolina, following the common law, that a husband may beat his wife with "a stick as large as his finger, but not larger than his thumb." *State v. Rhodes*, Phil. L. (N. C.) 453.

"Whatever may be the common law rule on the subject" says Chancellor Walworth, "the moral sense of this community in our present state of civilization will not permit the husband to inflict personal chastisement on his wife even for the grossest outrage." *Perry v. Perry*, 2 Paige, 501.

If the wife squanders his estate or goes into lewd company he may deprive her of liberty, otherwise not. *Comyns Digest*, Baron and Feme, O.

At common law the husband was the guardian of the person of the wife, and was bound to protect and maintain her, and he was given a legal superiority and control over her person, and he could even restrain her of her liberty, though not unjustly. 2 Kent. Com. 181.

Right to wife's services.

This subject is treated as an incident to the wife's right to her earnings, *ante*, p. 287.

TORTS BY AND AGAINST MARRIED WOMEN.

At common law a husband was liable for the torts of his wife. If committed in his presence or by his order, he alone was liable; this on the theory that it was his duty to restrain her. If the tort were not committed in his presence, they were jointly liable.

Under the statute the husband is not liable, unless he be a joint tortfeasor.

Domestic Relations Law. § 57. Right of action by or against married woman for torts.

A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved. This section does not affect any right, cause of action or defense existing before the eighteenth day of March, eighteen hundred and ninety.

The husband was liable at common law for the torts and frauds of his wife committed during coverture; if they were committed in his company or by his order, he alone was liable; if they were not so committed, the husband and wife were jointly liable. 2 Kent Com. 149.

But an action for a tort done by the husband and wife jointly shall be against the husband alone; for the whole shall be intended to be the act of the husband. Comyns Digest, Baron and Feme, Y.

“The husband is answerable for the ante-nuptial torts of his wife the same as for her ante-nuptial contracts.” 15 Am. & Eng. Enc. 894.

“So an action which charges the husband for an act of his wife done before coverture shall be against both; as trover upon a conversion by the wife before marriage or detain for goods taken by the wife before coverture.” Comyns Digest, Baron and Feme, Y.

Prior to the passage of the Act of 1890, the husband was held liable for the strictly personal torts of the wife. *Rowe v. Smith*, 45 N. Y. 230. The court in this case says: “The statute declares that the real and personal property of a wife

shall remain her sole and separate property, and shall not be subject to the interference or control of her husband. If, therefore, the husband is liable solely or jointly with his wife for the injuries of which the plaintiff complains, the ground of that liability must be found in the general principle that the husband is liable for the torts of his wife. The theory upon which this liability proceeds is, that the marriage subjects the person of the wife to the dominion and control of her husband, so that the commission of a tort by her is, in a degree at least, the result of his fault or omission.

At common law the husband was liable to be sued jointly with his wife for all torts committed by her prior to or during coverture, and therefore where she wrongfully took and converted personal property belonging to another, the action was properly against both husband and wife, though he was in fact innocent of any wrong and never received any part of the property. *Kowing v. Manly*, 49 N. Y. 192.

The Act of 1890 changed the common-law rule of the liability of the husband and also the rule as stated under the provisions of the enabling act. As the law now stands the husband is not liable for the wrongful or tortious acts of the wife, whether personal in their nature or committed in respect to the wife's sole and separate property, unless occasioned by the actual coercion or instigation of the husband. *Kujek v. Goldman*, 9 Misc. Rep. 34; 59 N. Y. St. Repr. 543; 29 N. Y. Supp. 294.

In the case of *Baum v. Mullen*, 47 N. Y. 577, it was held that the enabling act did not alter the common-law liability of the husband for the personal torts of his wife, but when such torts were committed in the management and control of her separate property, the rule was changed and she only was liable.

Under the enabling acts a married woman has such freedom of control over her own real property that a husband cannot, without her consent and against her will, establish and maintain a nuisance upon it, and if she permits him so to do she is liable for the damages oc-

casioned thereby. In an action against a husband and wife to recover damages for injuries occasioned by the bite of a dog, it appeared that the husband was the owner of the dog, but kept it upon premises owned and controlled by the wife, that she knew of the vicious propensities of the dog, but permitted it to be cared for upon the premises. There was no evidence that the husband had other property upon the premises; that he had any control of his wife's property or that he knew of the vicious propensities of the dog. He was sought to be held liable solely on the ground of his marital liability for the torts of his wife. It was held, that the wife was liable, but that a judgment against the husband was error. *Quilty v. Battie*, 135 N. Y. 201. See also *Vallantine v. Cole*, 1 N. Y. St. Rep. 719.

A wife may maintain an action in her own name to recover for injuries to her person, character, or property, and the proceeds of the action belong to her. But her husband, being still entitled to her services, may also maintain an action when the injury deprives him of her services.

See Domestic Relations Law. § 57. supra.

Domestic Relations Law. § 51 (in part).

All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife.

Prior to the enactment of the Act of 1890, a married woman in an action brought to recover damages for personal injuries caused by the wrongful act of another could only recover for the direct injury. She was not entitled to recover consequential damages resulting from her inability to labor, unless she carried on a trade or business or performed labor or services on her sole and separate account. Her services and earnings belonged to her husband, and for the loss of such services he could recover. *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 47; *Brooks v. Schwerin*, 54 N. Y. 343; *Clark v. Dillon*, 6 Daly, 526.

In an action for personal injuries prior to the passage of the Act of 1890, it was held that a married woman might

recover for inability to labor on her own account occasioned by the injury; but not for loss of earnings unless she was actually engaged in business or performing services on her sole and separate account. *Becker v. Janinski*, 27 Abb. N. C. 45.

In speaking on this subject, Judge Vann, in the case of *Blaechinski v. Howard Mission and Home*, 130 N. Y. 497, 503, says: "Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only and that the consequential damages for the loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, because the statute has given them to her, but the damages for the loss of her services belong to him, because the common law gave them to him and the statute has not taken them away."

The cause of action in this case arose prior to the passage of the Act of 1890, but there was nothing in that act, or in the above section, which would change the rule as here laid down.

In *Thuringer v. N. Y. C. & H. R. R. Co.*, 71 Hun, 526; 55 N. Y. St. Repr. 87; 24 N. Y. Supp. 1087, an action was brought by a married woman for an injury which occurred subsequent to the Act of 1890. In this case the court held that the services of a wife in the household still belonged to her husband, and so far as an injury to her disables her from performing such services, the loss is his, and he alone can recover therefor. In arriving at this conclusion the court cites *Filer v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 49, 56; *Brooks v. Schwerin*, 54 N. Y. 343, 348; *Coleman v. Burr*, 93 N. Y. 17, and the case of *Blaechinski v. Howard Mission and Home*, above cited.

A woman suing a person not her husband for conversion of property is not obliged as part of her case to prove the source of her title or that she had a separate estate. Under the present statute a married woman now sues in respect to such property as if she were single. *Lumley v. Torsiello*, 69 App. Div. 76; 74 N. Y. Supp. 567.

A husband suing for personal injuries to his wife may recover for the loss of her society in addition to and distinguished from the loss of her services. The loss of society cannot be measured in dollars and cents but is left to the discretion of the court. *Lyons v. N. Y. City R.*, 49 Misc. Rep. 517; 97 N. Y. Supp. 1033.

A husband cannot recover for negligence causing injury to his wife's wearing apparel. *Gilligan v. Consolidated Gas Co.*, 47 Misc. Rep. 658; 94 N. Y. Supp. 273.

The unity of husband and wife is so far preserved that one cannot sue the other to recover damages for personal injuries. Such injury may however furnish ground for a separation, or for a criminal prosecution. See, chastisement of wife, ante, p. 310.

A wife cannot maintain an action against her husband for damages for assault and battery, as in law husband and wife are one. Nor do the provisions of section 57 of the Domestic Relations Law giving a right of action to her for an injury to her person confer a right to maintain an action for assault and battery against her husband. Nor is such action one "for an injury arising out of the marital relation." Nor can a wife defeated in such action be charged with costs. *Abbe v. Abbe*, 22 App. Div. 483, 48 N. Y. Supp. 25.

CRIMINAL CONVERSATION; ALIENATION OF AFFECTION; ENTICING AWAY SPOUSE.

Either spouse has a right to the faithfulness, affection, and to the society of the other. A third person infringing upon any of these rights is liable in damages. Hence the actions for criminal conversation, alienation of affection, and enticing away.

No attempt is made to give an extended discussion of the actions of criminal conversation and alienation of affection. Being actions in tort, they are considered not to be within the scope of this book. The right to maintain the actions is merely indicated as one arising out of the marital relation.

"Adultery or criminal conversation with a man's wife though it is a public crime left by laws to the coercion of the courts yet considered as a civil injury (and surely there can be no greater) the law gives a satisfaction to the husband for it by an action of trespass *vi et armis* against the adulterer wherein the damages recovered are usually very large and exemplary." 3 Bl. Com. 139.

"The husband is also entitled to recover damages in an action on a case against such as persuade and entice the wife to live separate from him without a sufficient cause. The old law was so strict on this point that if one's wife missed her way upon the road it was not lawful for another man to take her into his house unless she was benighted or in danger of being lost or drowned; but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband or to the spiritual court to sue for a divorce." 3 Bl. Com. 139.

"A husband being entitled to the services of his wife and the comfort of her society any wrongful interference therewith gives him a right of action. Thus, he may maintain an action for criminal conversation, for abduction of the wife or for enticing or harboring her, she not being supposed capable of consenting in either of these cases. *Van Arnham v. Ayres*, 67 Barb. 545.

The present English statute allows the husband in an action for divorce to recover damages from the adulterer. See *ante*, p. 40.

A husband and wife have three marital rights: (1) to faithfulness; (2) to affection and (3) to society. Any infringement of one or more of these three rights falls into three classes: (1) criminal conversation; (2) alienation of affection and (3) abduction or enticing away by which the society of the spouse is lost. It should always be borne in mind that in practical litigation the wrongs are generally combined. *Fiero on Torts*, 338.

Since the statute removes the disability of a married woman she may sue in her own name one who entices away her husband or deprives her of his society. *Baker v. Baker*, 16 Abb. N. C. 293.

Action is in tort.

The action for criminal conversation is an action for a personal injury. *Bennett v. Bennett*, 116 N. Y. 584.

As an action for criminal conversation is in tort it cannot be transferred though it does not abate with the death of the plaintiff's spouse, she not being a party to the action. *Fiero on Torts*, 341.

The action for criminal conversation does not rest on the loss of the wife's services but upon injury sustained by the defilement of the marriage bed. *Tiffany Dom. Rel.* 80.

Distinction between the actions.

That the action for enticing away a wife and for criminal conversation are distinct is shown by the fact that an action for the latter may be maintained even though there has been a previous recovery on the former ground. *Schnell v. Blohm*, 40 Hun, 378.

An action for alienation of affection cannot be based solely upon improper sexual relations; there must be active interference on the part of the defendant whereby he wrongfully alienated the wife's affections. *Hanor v. Housel*, 128 App. Div. 801; 113 N. Y. Supp. 163.

One who alienates a wife's affections is liable though there be no elopement or adultery and it is not necessary to show loss of services though such proof may be given in aggravation of damages. *Bennett v. Bennett*, 116 N. Y. 587.

The gist of a husband's action for alienation of affection is the loss of his wife's society. Criminal conversation is not a necessary element of the action, but it may be alleged in aggravation of damage. *Weston v. Weston*, 86 App. Div. 159; 83 N. Y. Supp. 528.

An action by the wife for alienation of her husband's affections lies, though the husband continued to live with the plaintiff. The basis of the action is loss of consortium or the loss by the wife of the conjugal society of the husband. *Van Olinda v. Hall*, 88 Hun, 452, 68 N. Y. St. Repr. 711; 34 N. Y. Supp. 777.

Defenses.

Connivance of the plaintiff is a defense to an action for alienation of affection. *Persch v. Weiseman*, 106 App. Div. 553; 94 N. Y. Supp. 800.

The defendant in an action for criminal conversation may show in mitigation of damages that the plaintiff had no affection for his wife but cruelly treated and abandoned her. *Allen v. Besecker*, 55 Misc. Rep. 366; 105 N. Y. Supp. 416.

It is no defense to an action for criminal conversation that before the tort the plaintiff's wife had sued him for divorce and that a decree in her favor was subsequently rendered. *Purdy v. Robinson*, 133 App. Div. 155; 117 N. Y. Supp. 295.

Where in an action against a husband's parents for alienating his affections, the evidence would justify a finding that he never had any affection for his wife and that it had been alienated in other ways than those pursued by his parents, it is error to refuse to charge that there can be no recovery if the husband had no affection for the plaintiff at the time he abandoned her or that it had been previously alienated by other causes. *Servis v. Servis*, 172 N. Y. 438.

By a recent statute (1907), adultery has been made a crime.

Penal Law. § 100. Adultery defined.

Adultery is the sexual intercourse of two persons, either of whom is married to a third person.

Penal Law. § 101. Adultery a misdemeanor.

A person who commits adultery is guilty of a misdemeanor.

Penal Law. § 102. Punishment for adultery.

A person convicted of a violation of this article is punishable by imprisonment in a penitentiary or county jail, for not more than six months or by a fine of not more than two hundred and fifty dollars, or by both.

Penal Law. § 103. Conviction can not be had on unsupported testimony.

A conviction under this article can not be had on the uncorroborated testimony of the person with whom the offense is charged to have been committed.

HUSBAND AND WIFE AS WITNESSES.

At common law husband and wife could not testify for or against each other in civil suits, nor against each other in criminal cases.

The disability is removed by statute, except that they cannot testify to confidential communications made during marriage, nor in an action founded upon adultery, with certain exceptions. As to the latter provision see, ante, p. 163.

Code Civ. Proc. § 828. No witness to be excluded by reason of interest, etc.

Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended.

Code Civ. Proc. § 831. When husband and wife not competent witnesses. When competent.

A husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. A husband or wife shall not be compelled, or without consent of the other, if living, allowed, to disclose a confidential communication, made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant as to any matter in controversy; except

that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

Penal Law. § 2445. Husband or wife as witness.

The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage.

"In trials of any sort they (husband and wife) are not allowed to be witnesses for or against each other; partly because it is impossible that their testimony would be indifferent but principally because of the union of person." 1 Bl. Com. 443.

By common law husband and wife could not be witnesses for or against each other in civil suits, nor were they allowed to testify in criminal cases to incriminate each other. 2 Kent Com. 179.

All communications between husband and wife are not privileged and a party seeking to exclude evidence of such communications must specify the ground of his objection; an objection that the evidence is immaterial and irrelevant is insufficient. *Lunham v. Lunham*, 133 App. Div. 215; 117 N. Y. Supp. 396.

In an action for alienation of affection with criminal conversation in aggravation of damages, an affidavit of the wife and her conversations with her husband tending to show the adultery are inadmissible being confidential communications. *Hanor v. Housel*, 128 App. Div. 801; 113 N. Y. Supp. 163.

In an action for criminal conversation, the plaintiff may testify that his wife in his presence addressed a letter to the defendant acknowledging her criminal relations with him and a copy of such letter

may be introduced in evidence to contradict the wife's denial as it is not a confidential communication. *Weston v. Weston*, 86 App. Div. 159; 83 N. Y. Supp. 528.

The wife of one indicted for murder is not, under section 715 of the Penal Code, [Penal Law § 2445] privileged from testifying that she received letters from her husband and mailed them at his request, which letters contained a confession, if she was not informed of their contents and was not aware of the names of the addressees. *People v. Truck*, 170 N. Y. 203.

See *Wilke v. People*, 53 N. Y. 525; *People v. Bosworth*, 64 Hun, 72; 45 N. Y. St. Repr. 512; 19 N. Y. Supp. 114; *People v. Wood*, 126 N. Y. 249; *People v. Truck*, 170 N. Y. 204, 212.

CHAPTER XI.

DOWER.

A widow's dower is an estate in lands created by operation of law. It must not be confused with any rights a widow may have in personal property owned by her husband.

Dower is a life estate in one third of all the lands whereof the husband was seized of an estate of inheritance at any time during the marriage.

Prior to the death of the husband the dower is said to be inchoate.

Real Property Law. §190. Dower.

A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage.

“Tenant in dower is where the husband of a woman is seized of an estate of inheritance and dies; and in this case the wife shall have the third part of all the lands and tenements, whereof he was seized at any time during the coverture to hold to herself for the term of her natural life. Dower is called in Latin by the foreign jurists *doarium* but by Bracton and our English writers *dos*; which among the Romans signified the marriage portion which the wife brought to the husband but with us is applied to signify this kind of estate to which the civil law in its original state had nothing that bore a semblance. Dower out of the lands seems also to have been unknown in the early part of our Saxon constitution for in the laws of King Edmond the wife is directed to be supported wholly out of the personal estate.” 2 Bl. Com. 129.

"It is possible therefore that it might be with us the work of a Danish custom since according to the historians of that country dower was introduced into Denmark by Swein the father of our Canute the Great, out of gratitude to the Danish ladies who sold their jewels to ransom him when taken prisoner by the Vandals." 2 Bl. Com. 129.

Two women cannot have dower in the same land at the same time. Thus, where a father dies and his widow, taking dower, survives a married son, the son's widow is only entitled to dower in her husband's share of the father's estate. *Johnson v. Johnson*, 46 Misc. Rep. 314; 93 N. Y. Supp. 197.

Dower must be computed upon the value of lands at the date of the husband's death or his alienation of the property. The widow does not share in the value of improvements thereafter made. Hence, where after a husband's death a person by mistake built a house upon lands formerly owned by him, the widow is not entitled to a peremptory injunction restraining the removal of the building pending an action to admeasure her dower. *Emrich v. Emrich*, 129 App. Div. 557; 113 N. Y. Supp. 1052.

Dower, even while inchoate, is a vested right—that is to say, the wife's right to dower at her husband's death is superior to any claims by the husband's creditors not attaching before marriage. And no act or conveyance by the husband can cut off his wife's dower against her will. She can lose her right only by some voluntary act on her part, or by divorce granted for her fault.

But, of course, her rights are subject to any invalidity in the husband's original title.

Real Property Law. § 203. Effect of acts of husband.

An act, deed or conveyance, executed or performed by the husband without the assent of his wife, evidenced by

her acknowledgment thereof, in the manner required by law to pass the contingent right of dower of a married woman, or a judgment or decree confessed by or recovered against him, or any laches, default, covin, or crime of a husband, does not prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof.

A wife's inchoate right of dower cannot be reached by her creditors during her husband's life as it is not a chose in action. It seems, however, that on her husband's death it becomes a chose in action, although not yet admeasured. *Sherman v. Hayward*, 98 App. Div. 254; 90 N. Y. Supp. 481.

An inchoate right of dower is not an estate in lands and cannot be extinguished by merger or in any other way except by the death or conveyance of the wife. The fact that the husband deeded property during coverture, and his grantee re-conveyed it to the wife does not necessarily show that the husband intended to make her a jointure or provision in lieu of dower. Her acceptance of the deed does not estop her from subsequently claiming dower in the premises. *Huff v. Wheeler*, 27 Misc. Rep. 763; 59 N. Y. Supp. 716.

Dower is subject to the lien upon the lands of a judgment against the husband recovered before the marriage. *Scott v. Howard*, 3 Barb. 319; *Sandford v. McLean*, 3 Paige, 117.

A foreclosure, though effectual during the lifetime of the mortgagor, is not effectual to bar his wife's inchoate right of dower, unless she is made a party. *Mills v. Van Voorhis*, 20 N. Y. 412; *Wheeler v. Morris*, 2 Bosw. 524.

A sale in partition will bar the widow's right of dower, if she was a party to the action. *Jackson v. Edwards*, 7 Paige, 386; *Jordan v. Van Epps*, 85 N. Y. 427. But otherwise if she was not a party. *Van Gelder v. Post*, 2 Edw. 577.

An inchoate right of dower does not entitle a wife to redeem her husband's lands after a sale for failure to pay taxes; nor is she entitled to notice of the tax sale. *Rosenblum v. Eisenberg*, 123 App. Div. 896; 108 N. Y. Supp. 350.

Creditors of widow.

The creditor of a widow may attach her dower interest, although unadmeasured. *Latourette v. Latourette*, 52 App. Div. 192; 65 N. Y. Supp. 8.

Unless the husband be seized of an estate of inheritance during the marriage his widow takes no dower.

Real Property Law. § 31. Estates in fee simple and fee simple absolute.

An estate of inheritance continues to be termed a fee simple, or fee, and when not defeasible or conditional, a fee simple absolute, or an absolute fee.

What constitutes seizin.

To entitle the wife to dower, the husband must be seized, either in fact or in law, of a present freehold in the premises, as well as an estate of inheritance. Such a seizin cannot be predicated with respect to land purchased with the moneys of the husband, but not conveyed or agreed to be conveyed to him. *Phelps v. Phelps*, 143 N. Y. 197.

An interest in a pier for which ejectment could be maintained by the husband, is a legal estate which descends to his heirs, and of which dower is predicable. *Bedlow v. Stilwell*, 91 Hun, 384; 71 N. Y. St. Repr. 11; 36 N. Y. Supp. 129; *affd.* 158 N. Y. 292.

It is not necessary to show that the husband actually took possession of the land, and where no adverse possession is shown, a title vested in him will constitute such seizin as the statute requires. *McIntire v. Costello*, 47 Hun, 289; 14 N. Y. St. Repr. 370.

The wife of an heir, who takes a tenant in common, has an inchoate right of dower in the share of her husband, because he is seized of an estate of inheritance. *Jourdan v. Haran*, 56 N. Y. Super. Ct. 185.

A grandson of a decedent whose parent is living so that

he has no immediate interest in decedent's estate, has not an estate in possession, to which the right of dower of his wife will attach, and an agreement entered into by him not to contest the will, which is fully carried out and executed, will prevent the wife from acquiring any dower interest therein. *Jones v. Duff*, 47 Hun, 170.

A testator's will directed that his wife have the use of his farm during her widowhood, and by subsequent provisions devised the fee. It was held that she took an interest during her widowhood and while that continued, the devisee of a portion had no seizin which would entitle his widow to dower therein on his death. *Beekman v. Hudson*, 20 Wend. 53; *Adams v. Beekman*, 1 Paige, 631; *Dunham v. Osborne*, 1 Paige, 634. See also *Beardslee v. Beardslee*, 5 Barb. 324.

Where the husband holds land by adverse possession, but, before the lapse of the period necessary to ripen into the presumption of a grant, he conveys the land to the holders of the superior title, his seizin fails and his widow is not entitled to dower against them. *Poor v. Horton*, 15 Barb. 485.

Remainders not vesting in possession during marriage.

The widow of a remainderman dying before the termination of the life estate is not entitled to dower. *Stewart v. Crysler*, 52 App. Div. 597; 65 N. Y. Supp. 483.

A widow is not entitled to dower in a vested remainder owned by her husband which during his lifetime he conveyed to the owner of the precedent estate. *Jackson v. Walters*, 86 App. Div. 470; 83 N. Y. Supp. 696.

A widow cannot be endowed of a reversionary interest or vested remainder expectant upon an estate for life. *Durando v. Durando*, 23 N. Y. 331; *Green v. Putnam*, 1 Barb. 500. But where a husband is seized of a vested remainder expectant upon a life estate, subject to be defeated by his own death, prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower, subject to be defeated, as above. *House v. Jackson*, 50 N. Y. 161.

Where there is a devise to executors in trust, income to the testator's widow for life, remainder to his children, dower does not attach to the interest of a son during the life of the life beneficiary. *Matter of Faile*, 51 Misc. Rep. 166; 100 N. Y. Supp. 856.

Conveyance by husband before marriage.

A wife does not take dower in lands which prior to the marriage her husband deeded to his sons, delivering the deeds in escrow to be recorded at his death, and reserving in the meantime a right to receive the rents and profits. *Yutte v. Yutte*, 39 Misc. Rep. 272; 79 N. Y. Supp. 492.

In contemplation of marriage a person conveyed real property by way of advancement to his son, with intent to defeat the right of dower of his intended wife, and she married him not knowing of the conveyance. It was held that she could not enforce a claim for dower. *Baker v. Chase*, 6 Hill, 482.

A deed was given by a husband just before his marriage to his daughter without any consideration and kept concealed till after the marriage. It had been held fraudulent as against a subsequent mortgagee. It was held that it was to be adjudged equally fraudulent as against the widow's claim for dower. *Swaine v. Perrine*, 5 Johns. Ch. 482. See also *Youngs v. Carter*, 1 Abb. N. C. 136; *Pomeroy v. Pomeroy*, 54 How. Pr. 228; *Babcock v. Babcock*, 53 How. Pr. 97.

Equitable title of husband.

A wife does not take dower in lands which her husband, paying the consideration, caused to be conveyed to a third person although he remained in possession. The equitable right in the husband to reconvey is not assigned so as to give rise to an inchoate dower. *Nichols v. Park*, 78 App. Div. 95; 79 N. Y. Supp. 547.

A widow has no dower in lands held by her husband as trustee, or as equitable mortgagee. *Terrett v. Crombie*, 6 Lans. 82. See also *Clark v. Clark*, 147 N. Y. 639; *Cooper v. Whitney*, 3 Hill, 95; *Germond v. Jones*, 2 Hill, 569.

Where a husband has made an equitable assignment of his interest in his father's property, his wife does not take dower after the father's death as against the assignee. *Baker v. Bagg*, 61 Misc. Rep. 186; 114 N. Y. Supp. 660.

Lands owned by partnership or corporation.

A widow has no right to dower, inchoate or absolute, in the lands owned by a partnership of which her husband was a member until the equities of the partners therein are adjusted after dissolution; and before the death of her husband she cannot maintain an action to secure an adjudication that she is entitled to inchoate dower. *Hauptmann v. Hauptmann*, 91 App. Div. 197; 86 N. Y. Supp. 427.

So long as the affairs of a copartnership remain unsettled, the widow of a partner is not entitled to dower in the partnership realty. *Riddell v. Riddell*, 85 Hun, 482; 66 N. Y. St. Repr. 702; 33 N. Y. Supp. 99; citing *Sage v. Sherman*, 2 N. Y. 417. See *Darrow v. Calkins*, 154 N. Y. 516.

Where a corporation owning a mortgage on the lands of a husband which he acquired subject to the mortgage purchases the same on a foreclosure to which the wife was made a party, she is not entitled to dower although the husband owned most of the stock. This, because the seizure of the corporation obtained on foreclosure was not the seizure of the husband to which an inchoate right of dower could attach. *It seems*, that if the husband organized the corporation in order to cut off his wife's dower, and concealed the fact that he was the chief owner of that capital stock, she should have presented that defense in the foreclosure action. *Poillon v. Poillon*, 90 App. Div. 71; 85 N. Y. Supp. 689.

DOWER IN LANDS WHICH ARE EXCHANGED OR MORTGAGED.

If a wife do not join in her husband's mortgage executed during

coverture (excepting purchase money mortgages), she retains full dower rights as against the mortgagee. And if she do join she has dower in the equity of redemption.

Moreover, where the husband mortgaged before marriage, or gives a purchase money mortgage on lands bought during coverture, the widow is entitled to dower as against all persons save the mortgagee.

The widow of a mortgagee has no dower, unless he becomes seized of the legal title during marriage.

Where lands are exchanged the widow may elect to take dower in either parcel.

Real Property Law. § 192. Dower in lands mortgaged before marriage.

Where a person seized of an estate of inheritance in lands, executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

Real Property Law. § 193. Dower in lands mortgaged for purchase-money.

Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.

Real Property Law. § 194. Surplus proceeds of sale under purchase-money mortgages.

Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage, or by virtue of a judgment in an action to foreclose the mortgage, and any surplus remains after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third part of the surplus for her life, as her dower.

Real Property Law. § 195. Widow of mortgagee not endowed.

A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.

Real Property Law. § 191. Dower in lands exchanged.

If a husband seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both, but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange.

The inchoate dower of a wife who did not join in a mortgage is not affected by foreclosure. Hence, although made a party it is not necessary for her to assert her dower rights by answer. *Anderson v. McNeely*, 120 App. Div. 676; 105 N. Y. Supp. 278.

A wife who has not joined in a mortgage on her husband's lands so as to convey her inchoate dower, may redeem them after a sale on foreclosure and may maintain an action against the purchaser for that purpose. She can also redeem before judgment although her husband be living, but she is not entitled to share in any increase in value occurring after the sale. *Mackenna v. Fidelity Trust Co.*, 184 N. Y. 411.

A *feme covert* who executes a mortgage jointly with her husband is nevertheless entitled to dower in the equity of redemption, which right is not affected by foreclosure unless she be made a party. *Mills v. Van Voorhies*, 20 N. Y. 412.

The wife's inchoate right of dower in the husband's lands follows the surplus moneys raised by a sale under a power

contained in a mortgage, and should be protected against the claims of the husband's creditors by directing one-third of such surplus moneys to be invested, and the interest only to be paid to the creditors, during the joint lives of husband and wife. *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 Barb. 561. But see *Titus v. Neilson*, 5 Johns. Ch. 452; *Bell v. Mayor, etc.*, of N. Y., 10 Paige, 49; *Frost v. Peacock*, 4 Edw. Ch. 678.

The widow of the owner of the equity of redemption is not barred of her right to dower in surplus moneys, arising on a foreclosure, by her failure to assert her claim in proceedings to obtain the surplus, where the person to whom such surplus has been paid has not been induced to take any action or part with anything, and has sustained no injury by the widow's neglect. *Matthews v. Duryee*, 45 Barb. 69.

Where a wife had obtained a separation from her husband without alimony, it was held that where one-third of the surplus on foreclosure was deposited in court to secure the wife's inchoate right of dower, the court should not direct the payment of the money so deposited to the husband upon his executing a bond conditioned to pay the same to the wife should she survive her husband. *Emigrant Industrial Bank v. Regan*, 41 App. Div. 523; 58 N. Y. Supp. 693.

Mortgage before marriage.

Where the husband has executed a mortgage for the purchase money before marriage, the widow cannot claim dower as against the mortgage or those claiming under him, while she may as to all other parties. *Smith v. Gardner*, 42 Barb. 356, 365.

A widow is entitled to dower in an equity of redemption, as well when the mortgage was executed before marriage, as when it was executed by the husband and wife during coverture. *Denton v. Nanny*, 8 Barb. 618.

Purchase money mortgages.

At common law, where land was conveyed to the husband during coverture, who at the same time executed a mortgage

to the grantor to secure the payment of the consideration money, the seizin of the land is but for an instant in the grantee, and is immediately revested in the grantor, and it was therefore held that the widow of the grantee cannot claim dower in the premises. *Stow v. Tift*, 15 Johns. 458.

The provisions of this section do not affect the wife's right of dower in the equity of redemption. *Mills v. Van Voorhees*, 20 N. Y. 412; *Blydenburgh v. Northrop*, 13 How. Pr. 289.

The wife takes dower in the mortgaged premises subordinate to the power of sale as well as in the lien of a purchase-money mortgage in which she did not join. *Brackett v. Baum*, 50 N. Y. 8.

A mortgage executed for the purchase money of land pursuant to an oral agreement by which it was to have been taken at the time of a conveyance, although in fact executed some time subsequently, is superior to the dower interest of a wife of a mortgagor to whom he is married in the intervening period. *Ulrich v. Ulrich*, 17 N. Y. St. Repr. 414; 1 N. Y. Supp. 777.

Although a purchase-money mortgage is superior to the dower right of the wife of the mortgagor, yet where she has never been made a party to any action to foreclose her right of dower in the premises, she is entitled to the equity of redemption as against the mortgagee. *Sheldon v. Hoffnagle*, 51 Hun, 478; 21 N. Y. St. Repr. 637; 4 N. Y. Supp. 287.

Exchange of lands.

The word "exchange" as used in the section means a mutual grant of equal interests, the one in consideration of the other. *Wilcox v. Randall*, 7 Barb. 633. It was held in this case that a transfer of an equitable interest in lands in consideration of a conveyance of a fee of lands and a transfer of personal property was not an exchange within the meaning of the statute.

Nor is a sale of lands and a conveyance of other lands in part payment, under peculiar circumstances. *Runyan v. Stuart*, 12 Barb. 537.

HOW DOWER MAY BE LOST.

If a wife, being of age, join in her husband's deed she conveys her dower rights to his grantee. But if the deed be avoided her dower is restored.

The wife's joinder with her husband in a conveyance of land precludes her from afterwards claiming dower in the premises, as against the grantee or mortgagee, so long as there remains a subsisting title or interest created by his conveyance; but when the husband's deed is avoided or ceases to operate, as when it is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation, and may, after the death of her husband, recover dower as though she had never joined in the conveyance. *Hinchliffe v. Shea*, 103 N. Y. 153.

The release of dower which a married woman makes by joining with her husband in a conveyance of his land, operates against her only by estoppel, and can be taken advantage of only by those who claim under that conveyance. *Malloney v. Horan*, 49 N. Y. 111; 12 Abb. Pr. N. S. 289; *Elmendorf v. Lockwood*, 4 Lans. 393; affirmed, 57 N. Y. 322.

An infant wife does not by her joining in her husband's deed bar her inchoate right of dower. *McIntyre v. Costello*, 47 Hun, 289; 14 N. Y. St. Repr. 370.

A wife may, subsequently to the execution and delivery of a deed by the husband, convey and release by a separate instrument, her interest, dower, etc., in the premises; and such act is to be regarded as an adoption of and joining in her husband's conveyance. *Irving v. Campbell*, 56 N. Y. Super. Ct. 224; 18 N. Y. St. Repr. 966; 4 N. Y. Supp. 103.

If a wife joins her husband in a deed absolute in form, but which is in fact a mortgage, and it is afterwards canceled or superseded by giving a subsequent mortgage, in which she does not sign, her right of dower remains free and clear of incumbrance. *Taylor v. Post*, 30 Hun, 446.

Where a deed is declared void, the release by the grantor's wife of her contingent right of dower fails as being a release to a stranger to the title. *Hammond v. Pennock*, 61 N. Y. 145. See also *Lowry v. Smith*, 9 Hun, 514.

A deed which "grants, bargains, sells, aliens, remises, releases, conveys, and confirms" the land, and "all the estate, right, title and interest, etc., of the grantors to the land," is sufficient to release the wife's right of dower in the land. *Gillilan v. Swift*, 14 Hun, 574.

A wife cannot release her inchoate dower directly to her husband, unless there be a decree of divorce or separation.
Nor can she release to a third person who is a stranger to the title.

Real Property Law. § 206. Divorced woman may release dower.

A woman who is divorced from her husband, whether such divorce be absolute or limited, or granted in his or her favor, by any court of competent jurisdiction, may release to him, by an instrument in writing, sufficient to pass title to real estate, her inchoate right of dower in any specific real property theretofore owned by him, or generally in all such real property, and such as he shall thereafter acquire.

Real Property Law. § 207 Married woman may release dower by attorney.

A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.

"It is an admitted rule of the common law that a wife cannot relinquish her dower in real estate to her husband by executing a release thereof to him." *Crain v. Cavana*, 36 Barb. 410; *Carson v. Murray*, 3 Paige, 483.

"The wife cannot, as a general rule, convey her dower interest to her husband so as to either vest the right in him or enable him to convey it to another. This is contrary to the policy of the law in reference to the right of dower. It makes it possible, and perhaps easy, in a sense, for the husband to get control of the dower interest, which in many cases would be to the great detriment of the wife, and, no doubt, many times to her entire loss of the estate. Any

attempt, therefore, by the wife to convey her dower interest to her husband is regarded in law as a nullity." *Rodgers Dom. Rel.* § 407.

Even though a provision in a separation agreement whereby a wife relinquishes her dower, is effectual for that purpose, she will be permitted to enforce the contract as she will be estopped from claiming dower in addition. *Barnes v. Klug*, 129 App. Div. 192; 113 N. Y. Supp. 325.

A wife after divorce or separation granted to either party may release her inchoate dower directly to her husband and thereafter the husband can convey a marketable title. *Schlesinger v. Klinger*, 112 App. Div. 853; 98 N. Y. Supp. 545.

The wife cannot execute a valid release of her dower in any other way than by joining with her husband in a conveyance to a third party; and a release of dower contained in a deed of separation, by which a provision is made for her, does not bar her legal right. *Carson v. Murray*, 3 Paige, 483, 503; *Guidet v. Brown*, 3 Abb. N. C. 295.

A contract entered into between husband and wife during coverture, by which it was agreed that, in consideration of her being permitted to control and enjoy the property which she had at the marriage, she should relinquish her claim to dower, cannot be enforced against her as a bar to her dower. *Townsend v. Townsend*, 2 Sandf. 711.

Release to stranger to title.

"A release of dower can be availed of then, only by one who claims under the very title which was created by the conveyance with which the release is joined. A release to a stranger to that title does not extinguish the right of dower." *Malloney v. Horan*, 49 N. Y. 111. See also, *Markin v. Smith*, 46 N. Y. 571; *Merchants' Bank v. Thompson*, 55 N. Y. 7.

A wife may lose her right to dower by voluntarily accepting property (of adequate value), in lien thereof.

Property in lieu of dower may be given to her (1) By a jointure, (2) By a pecuniary provision, and (3) By a testamentary

gift which expressly, or by necessary implication, is made in lieu of dower.

In all cases she has an election as to whether she will take dower or the provision in lieu thereof.

Real Property Law. § 197. When dower barred by jointure.

Where an estate in real property is conveyed to a person and his intended wife, or to the intended wife alone, or to a person in trust for them or for the intended wife alone, for the purpose of creating a jointure for her, and with her assent, the jointure bars her right or claim of dower in all the lands of the husband. The assent of the wife to such a jointure is evidenced, if she be of full age, by her becoming a party to the conveyance by which it is settled; if she be a minor, by her joining with her father or guardian in that conveyance.

Real Property Law. § 198. When dower barred by pecuniary provisions.

Any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed in the last section, bars her right or claim of dower in all the lands of her husband.

Real Property Law. § 199 When widow to elect between jointure and dower.

If, before the marriage, but without her assent, or, if after the marriage, real property is given or assured for the jointure of a wife, or a pecuniary provision is made for her, in lieu of dower, she must make her election whether she will take the jointure or pecuniary provision, or be endowed of the lands of her husband; but she is not entitled to both.

Real Property Law. § 200. Election between devise and dower.

If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her

dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband; but she is not entitled to both.

Real Property Law. § 201. When deemed to have elected.

Where a woman is entitled to an election, as prescribed in either of the last two sections, she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower. But, during such period of one year after the death of her said husband, her time to make such election may be enlarged by the order of any court competent to pass on the accounts of executors, administrators or testamentary trustees, or to admeasure dower, on an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator can not be ascertained within the period so limited, or other reasonable cause, and on notice given to such persons, and in such manner, as such court may direct. Such order shall be indexed and recorded in the same manner as a notice of pendency of action in the office of the clerk of each county wherein the real property or a portion thereof affected thereby is situated.

Jointure and pecuniary provision.

Before the Revised Statutes, from which section 197 is taken, a jointure or a competent and certain provision for the wife, in lieu of dower, if assented to by the father or the guardian of the infant, before marriage, was, in the absence of fraud, an equitable bar. But such a jointure must be certain and beneficial. It must be a provision to take effect immediately upon the husband's death, and to continue during

the widow's life, and be a reasonable and competent livelihood for her. *McCartee v. Teller*, 2 Paige, 511; *Hawley v. James*, 5 Paige, 318.

A pecuniary provision for the benefit of an intended wife must be made in lieu of dower in order to bar her right thereto, for dower is favored by the law. *Brown v. Brown*, 117 App. Div. 199; 102 N. Y. Supp. 291.

A pecuniary provision to bar dower must be a provision which the wife can take and enjoy after the husband's death. A provision which she has enjoyed and consumed in his lifetime is not within the statute. *Crain v. Cavana*, 36 Barb. 410.

The committee of a lunatic agreed with the lunatic's wife to pay the wife a certain sum, which she received, and in consideration thereof released all her right, title and interest, including her inchoate right of dower in her husband's real property. In an action to recover dower, brought by the wife after the husband's death, it was held that the money paid her was a pecuniary provision in lieu of dower and would bar her right to recover. *Jones v. Fleming*, 104 N. Y. 418.

Where a wife takes an ante-nuptial provision in lieu of dower the fund in case of her death to be repaid to her husband, and the wife survives him, the sum is subject to claims of her creditors rather than to the next of kin of the husband. *Palmer v. Hallock*, 94 App. Div. 485; 88 N. Y. Supp. 17.

Testamentary provision.

Where the will does not in express terms provide that bequests made to the widow are in lieu of dower, and they are not inconsistent therewith, that effect will not be implied unless the intent is clearly manifested. *Kimbel v. Kimbel*, 14 App. Div. 570; 43 N. Y. Supp. 900; *Gray v. Gray*, 5 App. Div. 132; 39 N. Y. Supp. 57.

Where a testator in terms declares a provision in his will in favor of his wife to be in lieu of dower, if she accepts it, she cannot have her dower in the testator's estate. To deprive her of her dower, or compel her to elect, the terms

of the will must be such as to show an intention on the testator's part to exclude the claim of dower. *Sandford v. Jackson*, 10 Paige, 266; *Lewis v. Smith*, 9 N. Y. 502; *Mills v. Mills*, 28 Barb. 454.

The fact that the devise exceeds the dower interest of the wife, does not, of itself, imply that the testator intended to bar the dower in the residue. *Havens v. Havens*, 1 Sandf. Ch. 324; *Mills v. Mills*, 28 Barb. 454. The claim of dower is to be favored, and the presumption is that a provision in the will not expressed to be in lieu, was intended as a bounty. *Lasher v. Lasher*, 13 Barb. 106; *Leonard v. Steele*, 4 Barb. 20; *Konvalinka v. Schegel*, 104 N. Y. 125; *Gray v. Gray*, 5 App. Div. 132; 39 N. Y. Supp. 57; *Stimson v. Vroman*, 99 N. Y. 74, 80.

A provision in a will giving testator's widow the income of all his real estate during life, "to be enjoyed, accepted and received by her in lieu of dower, and in addition to what interest she would have had as doweress, if this devise was not so made to her," is in lieu of dower, so that her acceptance of the provision precluded her from claiming dower as against the title acquired by foreclosure of a mortgage executed by the husband in his lifetime. *Nelson v. Brown*, 144 N. Y. 384; *Konvalinka v. Schegel*, 104 N. Y. 125.

A testamentary provision in lieu of dower when accepted becomes a debt of the estate and if the personalty is insufficient to pay the debt, the widow may enforce it in an action to partition the testator's lands. *Wilmot v. Robinson*, 42 Misc. Rep. 244; 86 N. Y. Supp. 575.

Where a testator devised real estate to his children subject to an annuity to be paid to his widow for life, and no other provision was made for her, and the annuity is not stated to be in lieu of dower, she is not put to an election but is entitled to both the annuity and the dower. *Horstmann v. Flege*, 172 N. Y. 381.

A devise of a life estate in all of the husband's property does not put a widow to an election between the devise and dower. But where

she consents that the premises be sold in an action of partition, in which she is a defendant, and she is allowed and paid the value of such life estate out of the proceeds, she cannot afterwards maintain an action against the purchaser for admeasurement of dower. *Hopkins v. Cameron*, 34 Misc. Rep. 688; 70 N. Y. Supp. 1027.

A will which gives the wife a house to live in, to rent, and keep in repair during her life, entitles her to occupy a flat, therein rent free, and to the use for life of the income thereof, and the provision is inconsistent with dower where she continues to live in the house after her husband's death. *Koezly v. Koezly*, 31 Misc. Rep. 397; 65 N. Y. Supp. 613.

Where a widow has accepted the provisions of a will in her favor expressed to be in lieu and satisfaction of her dower, the fact that a portion of the provisions in her favor is ineffectual as attempting to create a perpetuity, will not entitle her to dower in the lands embraced in the invalid provision, she retaining the other benefits conferred by the will, and not seeking to avoid her election. *Lee v. Tower*, 124 N. Y. 370.

Where testator gave all his estate, real and personal, to his wife for life, or during widowhood, with remainder to his children, and the widow entered and held the land until her second marriage, she was entitled to dower after her second marriage. *Church v. Bull*, 2 Den. 430.

A provision in a will giving the widow "the rents, income, interest, use, occupancy, of all my real and personal estate" upon the condition that she insure the buildings, pay taxes, keep in repair, etc., "for and during the term of her natural life," is inconsistent with dower, and sufficient to compel an election. *Matter of Zahrt*, 94 N. Y. 605.

Testator directed all his estate, real and personal, to be sold, and one-third the proceeds invested for the use of his wife during her widowhood; it was held insufficient to show that he intended this provision to be in lieu of dower so as to put her to her election. *Wood v. Wood*, 5 Paige, 596. But if he makes a specific disposition of the income and remainder of the remaining two-thirds, it is inconsistent with the widow's claim of dower, and she will be put to an election. *Starr v. Starr*, 54 Hun, 300; 27 N. Y. St. Repr. 348; 7 N. Y. Supp. 580. See also *Jurgens v. Rogge*, 16 Misc. Rep. 100; 37 N. Y. Supp. 249.

The widow's claim for dower, as well as her right to other provisions in a will, is not barred by accepting the latter, unless they are declared to be in lieu of dower; or to permit her to enjoy both would interfere with the other dispositions, and the manifest intentions of the will. *Matter of Smith*, 1 Misc. Rep. 269, 22 N. Y. Supp. 1067; *Ferris v. Ferris*, 10 Misc. Rep. 317; 63 N. Y. St. Repr. 169; 30 N. Y. Supp. 951; *White v. Kane*, 51 N. Y. Super. Ct. 295.

For a testamentary provision incompatible with dower, see *Matter of Gorden*, 172 N. Y. 25.

Election.

To constitute a case for an election, the jointure or other provision in lieu of dower, must be one in which she is to have some beneficial interest. A mere power in trust for the sole benefit of others is not sufficient. *Hawley v. James*, 5 Paige, 318.

The receipt of one-third of the rent of a husband's lands by the widow will not bar her action for dower. *Aikman v. Harsell*, 98 N. Y. 186.

The provisions of the section are in the nature of a statute of limitations. She is at once chargeable with the duty of informing herself as to the nature of the estate, and where the statutory period has elapsed, a court of equity cannot relieve against its provisions. *Akin v. Kellogg*, 119 N. Y. 441.

It is not necessary that the widow enter on or commence proceedings for assignment of her dower in all the lands to which her claim attaches within the year. If she begins proceedings for dower in any one parcel, it is sufficient. *Hawley v. James*, 5 Paige, 318, reversed on other grounds in 16 Wend. 61.

Under the provisions of this section permitting an extension of time for a widow to make an election of dower, there should be reasonable grounds for granting such an order. *Bradhurst v. Field*, 32 N. Y. St. Repr. 430; 10 N. Y. Supp. 452.

A widow is not put to an election between a testamentary provision and dower until it is judicially established that the will is valid. Hence, where she dies within the year following her husband's death and pending an action to have the will declared invalid for lack of testamentary capacity, her representatives may sue to recover the legacy made in lieu of dower. The action by the widow attacking the will does not show an intention not to accept the testa-

mentary provision. *Flynn v. McDermott*, 102 App. Div. 56; 89 N. Y. Supp. 506.

A widow by contesting the probate of her husband's will does not elect to take dower if the will be set aside or to take the testamentary provision if it be sustained. *Flynn v. McDermott*, 183 N. Y. 62.

A wife's right to election between dower and a testamentary provision in lieu thereof is wholly personal and if she be insane her committee cannot elect for her. Under the circumstances her failure to commence an action for dower is not an election to accept the testamentary provision. *Camardella v. Schwartz*, 126 App. Div. 334; 110 N. Y. Supp. 611.

A wife is deemed to have accepted a devise made by her husband, unless she takes proceedings to recover her dower within one year from her husband's death, even though she did not know of the provisions of the will, except in case of fraudulent concealment. The devisees and grantees under the will are not bound to give her notice. *Palmer v. Voorhis*, 35 Barb. 479.

A suit brought by a widow to set aside an instrument by which she elected to accept certain provisions of the will in lieu of dower, is not a proceeding for the recovery of dower, compelling her to take such proceedings within a year from the time of her husband's death. *Chamberlain v. Chamberlain*, 43 N. Y. 424.

The provisions of the section are not so conclusive against the wife as to prevent her being relieved therefrom when she has been induced to omit such action by fraudulent representations. *Akin v. Kellogg*, 39 Hun, 252, citing *Hindley v. Hindley*, 29 Hun, 318; *Manice v. Manice*, 1 Lana. 348, reversed on another point in 43 N. Y. 303; *Hone v. Van Schaick*, 7 Paige, 221, 233.

An election by a widow to accept a provision in her husband's will in lieu of dower will be set aside on her application to the court, if it appear that she was not at the time of her election fully aware of the extent and nature of her dower right. *Hindley v. Hindley*, 29 Hun, 318. But the widow will not be relieved from her election, because the provision made by the will proves to be worthless, especially against a grantee of her husband during his lifetime. *Aken v. Kellogg*, 48 Hun, 459; 16 N. Y. St. Repr. 428; 1 N. Y. Supp. 846; affirmed, 119 N. Y. 441.

Where a widow dies within a year after the death of her husband without having elected to take a testamentary provision in lieu of dower her executor may collect the legacy. *Flynn v. McDermott*, 183 N. Y. 62.

To put the wife to an election, the will must contain provisions inconsistent with her claim of dower in the particular part of the estate, as to which it is made. *Fuller v. Yates*, 8 Paige, 325; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Smith v. Kniskern*, 4 Johns. Ch. 9; *Jackson v. Churchill*, 7 Cow. 287; *Irving v. De Kay*, 9 Paige, 521; *Sandford v. Jackson*, 10 Paige, 266; *Lewis v. Smith*, 9 N. Y. 502; *Ferris v. Ferris*, 10 Misc. Rep. 317; *Wetmore v. Peck*, 66 How. Pr. 54; *Konvalinka v. Scheegel*, 104 N. Y. 125.

The mere request of a testator that a wife release her dower in the residuum does not put her to an election, as mere precatory words are insufficient. In order to compel an election there must be testamentary provision intended to be in lieu of dower. *Miller v. Miller*, 22 Misc. Rep. 582; 49 N. Y. Supp. 407.

For a case where the refusal of a widow to transfer property standing in her name, as requested to do by will, making provision for her in lieu of dower, was held not to be an election, see *Shanley v. Shanley*, 34 App. Div. 172; 54 N. Y. Supp. 652.

A widow who elects to accept a testamentary provision in lieu of dower is not entitled to interest on the legacy from her husband's death, but only after the expiration of one year from the date of letters testamentary. *Matter of Martens*, 106 App. Div. 50; 94 N. Y. Supp. 297.

A widow who is entitled to a testamentary provision in lieu of dower can compel the executors to render an intermediate account. She need not show that she has elected to take the provision and waive her dower when her petition shows that the executor has already paid her sums as legatee. *Matter of Tisdale*, 110 App. Div. 857; 97 N. Y. Supp. 494.

A wife is put to her election between dower and a testamentary provision inconsistent therewith, although it is not expressly stated to be in lieu of dower. *Wilson v. Wilson*, 120 App. Div. 581; 105 N. Y. Supp. 151.

EFFECT OF DIVORCE.

When a decree of absolute divorce is rendered against a wife, she loses her right to dower, and forfeits her rights under any jointure, devise, or pecuniary provision in lieu thereof.

But she does not lose dower on proof of her adultery, unless a decree of divorce is rendered. (See ante, p. 100.)

A woman does not take dower in lands acquired by her husband after a divorce, as he was not seized during coverture.

Real Property Law. § 196. When dower barred by misconduct.

In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

Code Civ. Proc. § 1760 (in part).

*When the action [for divorce] is brought by the husband the following regulations apply * * **

3. *Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property, or to a distributive share in his personal property.*

Real Property Law. § 202. When provision in lieu of dower is forfeited.

Every jointure, devise and pecuniary provision in lieu of dower is forfeited by the woman for whose benefit it is made in a case in which she would forfeit her dower; and on such forfeiture, an estate so conveyed for jointure, or devised, or a pecuniary provision so made, immediately vests in the person or legal representatives of the person in whom they would have vested on the determination of her interest therein, by her death.

A woman does not take dower in lands acquired by her former husband after a divorce obtained by her. *Nichols v. Park*, 78 App. Div. 95; 79 N. Y. Supp. 547.

A finding or verdict that she has been guilty of adultery is insufficient to bar her dower right unless followed by a decree of divorce. *Schiffer v. Pruden*, 64 N. Y. 47. See also *Schiffer v. Dietz*, 83 N. Y. 300, 310.

An interlocutory decree of divorce entered against a wife does not extinguish her right to dower and she is entitled thereto if her husband dies before the entry of final judgment. *Byron v. Byron*, 134 App. Div. 320; 119 N. Y. Supp. 41.

Wilful desertion and absence of a wife from her husband, for which he has procured an absolute divorce in another state, which is valid and effectual against the wife, is not such misconduct as will deprive her of dower in the husband's estate, under the provisions of this section. To deprive her of dower under such a judgment in this state, the misconduct must be adultery. *Van Cleaf v. Burns*, 138 N. Y. 540. See also *S. C.* 118 N. Y. 549.

Adultery is not enough to bar the claim of dower, but it must be followed by a divorce dissolving the marriage contract. *Cooper v. Whitney*, 3 Hill, 95; *Reynolds v. Reynolds*, 24 Wend. 193.

Where an absolute divorce is granted to the wife for the adultery of her husband, the alimony is not in lieu of dower. The court cannot require the release of her dower right either peremptorily or as a condition of granting a judgment of divorce. *Forrest v. Forrest*, 6 Duer, 102. It was so held also in the case of a limited divorce. *Crain v. Cavana*, 36 Barb. 410.

The statute of another state which declares that a wife who leaves her husband and dwells with her adulterer is barred of dower can have no force or effect in this state. *Rundle v. Van Inwegan*, 9 Civ. Proc. Rep. 328.

Where it was found in an action for divorce that the wife had been guilty of adultery, but that her husband had condoned it, it was held that her dower was not thereby barred. *Pitts v. Pitts*, 14 Abb. Pr. N. S. 97; 64 Barb. 482.

WIDOW'S QUARANTINE.

In addition to dower a widow has her quarantine, or right to maintenance in the chief house of her husband for forty days after his death.

She may also bequeath crops in the ground of lands held in dower.

Real Property Law. § 204. Widow's quarantine.

A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband.

Real Property Law. § 205. Widow may bequeath a crop.

A widow may bequeath a crop in the ground of land held by her in dower.

Section 204 only relates to lands to which she has a right of dower, and does not apply to leasehold property. *Volckner v. Hudson*, 1 Sandf. 215, 218.

At the expiration of the forty days, the heirs can eject the widow and compel her to bring suit for dower. *Siglar v. Van Riper*, 10 Wend. 414, 419.

The widow is entitled to the crop growing at the time of her husband's death on the land set apart to her for dower. *Clark v. Battorf*, 1 T. & C. 58; *Kain v. Fisher*, 6 N. Y. 597.

ACTION FOR DOWER.

As a widow is endowed of a life estate in but one-third of her husband's lands, it is essential that this third be admeasured or set apart for her before she can enter into possession. This may be done by agreement, or may be enforced by action.

The action for dower is minutely regulated by the Code of Civil Procedure, § 1596 to § 1625. It would serve no useful purpose to set forth these provisions in full. Those are selected which show various ways in which dower may be admeasured.

Code Civ. Proc. § 1604. Action barred by assignment of dower.

The acceptance, by a widow, of an assignment of dower,

in satisfaction of her claim upon the property in question, bars an action for dower, and may be pleaded by any defendant.

The right of dower may be assigned by the heir to the widow voluntarily. The admeasurement fixes only its location and extent. *Rutherford v. Graham*, 4 Hun, 796. But where the rent of real property has been assigned to the widow with her consent and accepted by her, to bar her action it must appear that the rent will endure for life. *Ellicott v. Mosier*, 7 N. Y. 201.

The receipt by the widow of one-third of the rent of real property, in lieu of dower, for several years after the death of her husband, does not constitute an assignment of dower, or bar her action therefor. To constitute an assignment of dower, by agreement or specific act of the widow, it should be clearly manifest that such was the intention. *Aikman v. Harsell*, 98 N. Y. 186.

An agreement by all parties in interest that the widow shall receive one-third of the rents of lands which are indivisible is an admeasurement of dower which will be recognized by the courts as such. The tenancy by the courtesy of the husband of one of the heirs is subject to such admeasurement of dower. *Howells v. McGraw*, 97 App. Div. 460; 90 N. Y. Supp. 1.

A widow put to an action to enforce her dower may recover damages from those who have withheld it.

Code Civ. Proc. § 1600. Damages may be recovered; how estimated.

Where a widow recovers, in an action therefor, dower in property of which her husband died seized, she may also recover in the same action, damages for withholding her dower, to the amount of one-third of the annual value of the mesne profits of the property, with interest; to be computed where the action is against the heir, from her

husband's death, or where it is against any other person, from the time when she demanded her dower of the defendant; and, in each case to the time of the trial, or application for judgment, as the case may be; but not exceeding six years in the whole. The damages shall not include anything for the use of permanent improvements, made after the death of the husband.

Code Civ. Proc. § 1601. Rule in action against alienee of husband.

Where a widow recovers dower, in a case not specified in the last section, she may also recover, in the same action, damages for withholding her dower, to be computed from the commencement of the action; but they shall not include anything for the use of permanent improvements, made since the property was aliened by her husband. In all other respects, the same must be computed as prescribed in the last section.

Code Civ. Proc. § 1602. Rule against non-occupants.

The last two sections do not authorize the recovery, against a defendant who is joined with others, of damages for withholding dower, in any portion of the property not occupied or claimed by him.

Code Civ. Proc. § 1603. Rule where action is against heirs, etc., aliening land.

Where a widow recovers dower in real property aliened by the heir of her husband, she may recover, in a separate action against him, her damages for withholding her dower, from the time of the death of her husband to the time of the alienation, not exceeding six years in the whole. The sum recovered from him must be deducted from the sum, which she would otherwise be entitled to recover from the grantee; and any sum recovered as damages from the grantee, must be deducted from the sum, which she would otherwise be entitled to recover from the heir.

The heir-in-law is liable from the death of the husband. A grantee becomes liable, only after a demand, after which his liability continues, not exceeding six years in all, until judgment admeasuring the dower is entered, although prior to that time he may have conveyed the land. *Price v. Price*, 54 Hun, 349; 27 N. Y. St. Repr. 110; 7 N. Y. Supp. 474.

Under the Revised Statutes it was held that the provisions contained in this section, were intended to prescribe the sole rule of damages, and the widow can recover in law and equity by and under the statute alone. *Kyle v. Kyle*, 67 N. Y. 400.

The amount of the dower is one-third of the value of the property at the time of alienation. *Marble v. Lewis*, 53 Barb. 432; 36 How. Pr. 337. See *Walker v. Schuyler*, 10 Wend. 480.

Where a grantee sued by a widow of a former owner for an admeasurement of dower has given his grantor who warranted title, notice of the action and asked him to defend, the grantor is bound by the judgment and liable for the amount paid to the widow as her dower right and costs and disbursements of the grantee. *Olmstead v. Rawson*, 188 N. Y. 517.

A widow suing the trustees and *cestuis que trustent* under her husband's will for an admeasurement of dower is entitled to interest from the date of her demand for dower. *Gorden v. Gorden*, 80 App. Div. 258; 80 N. Y. Supp. 241; *affd.* without opinion, 179 N. Y. 549.

If the land be capable of division, and that be for the best interests of the parties, a third part of the land may be set off by metes and bounds to be held by the widow for life.

Code Civ. Proc. § 1607. Interlocutory judgment for admeasurement.

If the defendant makes default in appearing or pleading;

or if the right of the plaintiff to dower is not disputed by the answer; or if it appears, by the verdict, report, or decision upon a trial, that the plaintiff is entitled to dower in the real property described in the complaint, an interlocutory judgment must be rendered; which, except as otherwise prescribed in this article, must direct that the plaintiff's dower in the property, particularly describing it, be admeasured by a referee, designated in the judgment, or by three reputable and disinterested freeholders, designated therein, as commissioners for that purpose.

Code Civ. Proc. § 1609. Dower, how admeasured.

The referee or the commissioners must execute their duties in the following manner:

1. *They must, if it is practicable, and, in their opinion, for the best interests of all the parties concerned, admeasure and lay off, as speedily as possible, as the dower of the plaintiff, a distinct parcel, constituting the one-third part of the real property of which dower is to be admeasured, designating the part so laid off by posts, stones, or other permanent monuments.*

2. *In making the admeasurement, they must take into consideration any permanent improvements, made upon the real property after the death of the plaintiff's husband, or after the alienation thereof by him; and, if practicable, those improvements must be awarded within the part not laid off to the plaintiff; or, if it is not practicable so to award them, a deduction must be made from the part laid off to the plaintiff, proportionate to the benefit which she will derive from so much of those improvements, as is included in the part laid off to her.*

3. *If it is not practicable, or if, in the opinion of the referee or commissioners, it is not for the best interests of all the parties concerned, to admeasure and lay off to the plaintiff a distinct parcel of the property, as prescribed in the foregoing subdivisions of this section, they must report that fact to the court.*

4. *They may employ a surveyor, with the necessary assistants, to aid in the admeasurement.*

The referee may, when in his opinion it is for the best interests of all the parties, lay off and admeasure the dower of the widow. But the widow is not entitled to have her dower assigned to her, in each separate and distinct parcel, when to do so would injuriously affect the equitable rights and interests of other parties. *Price v. Price*, 41 Hun, 486; 4 N. Y. St. Repr. 25.

The question as to improvements, is to be determined by the commissioners. *Marble v. Lewis*, 53 Barb. 432; *Brown v. Brown*, 4 Robt. 688.

In all cases a reference must be had to ascertain whether actual admeasurement or partition can be made, after a decision of the referee as to the rights of the parties under the issue, and before the judgment declaring such rights is entered. *O'Dougherty v. Remington Paper Co.*, 42 Hun, 192.

Dower should be assigned by metes and bounds if practicable, if not, a proportion of the profits or the separate alternate enjoyment of the whole for short proportionate periods may be assigned for dower. *Coates v. Cheever*, 1 Cow. 460.

Particular rooms of a house may be assigned. *White v. Story*, 2 Hill, 543.

No deduction can be made in consequence of any conveyance of land made by the husband to the wife during marriage. *Hyde v. Hyde*, 4 Wend, 630. Taxes and assessments are not to be deducted. *Taylor v. Bentley*, 3 Redf. 34; *Graham v. Dunigan*, 2 Bosw. 516; *Williams v. Cox*, 3 Edw. Ch. 178; *Harrison v. Peck*, 56 Barb. 251.

Although the statute does not require a notice to be given of the meetings of the commissioners, yet such notice is customary and proper. *Smith v. Smith*, 6 Lans. 813.

The statute does not dispense with proof of the material allegations of the complaint in case of default. *Dwyer v. Dwyer*, 13 Abb. Pr. N. S. 269.

If it be impracticable, or against the best interest of the parties, to make a physical division of the lands, the judgment may direct that a sum equal to one third of the rental value of the land be paid to the widow for life, the lands to stand as security for payment.

Code Civ. Proc. § 1613. What judgment must direct.

Upon the report being confirmed by the court, final judgment must be rendered. If the referee or commissioners have admeasured and laid off to the plaintiff a distinct parcel of the property, the judgment must award to her, during her natural life, the possession of that parcel, describing it, subject to the payment of all taxes, assessments, and other charges, accruing thereupon after she takes possession. If the referee or the commissioners report that it is not practicable, or that, in his or their opinion, it is not for the best interests of all the parties concerned so to admeasure and lay off a distinct parcel of the property, the final judgment must direct that a sum, fixed by the court, and specified therein, equal to one-third of the rental value of the real property, as ascertained by a reference or otherwise, be paid to the plaintiff, annually or oftener, as directed in the judgment, during her natural life, for her dower in the property; and that the sum so to be paid, be and remain a charge upon the property, during her natural life. The final judgment may also award damages for the withholding of dower.

Code Civ. Proc. § 1614. Plaintiff may recover sum awarded; court may modify judgment.

The plaintiff may, from time to time, maintain an action against the owner, or a person who was the owner of the property, to recover any instalment of the sum, so awarded to her for her dower, which became due during his ownership, and remains unpaid. Or, if an instalment remains due and unpaid, she may maintain an action to procure a sale of the property, and enforce the payment of the instalments, due and to become due, out of the pro-

ceeds of the sale. Such an action must be conducted as if the charge upon the real property was a mortgage to the same effect. If, at any time, it is made to appear to the court, that the rental value of the real property, has materially increased or diminished, the court may, by an order, to be made upon notice to all the persons interested, modify the final judgment, by increasing or diminishing the sum to be paid to the plaintiff.

The sum having been ascertained and fixed by the final judgment, the court has no power to alter such final judgment by providing that a party entitled to dower should receive one-third of the net rents which should be actually received from the party and no more. *McIntyre v. Clark*, 43 Hun, 352; 6 N. Y. St. Repr. 531.

A judgment in favor of the plaintiff in an action for admeasurement of dower may be amended by setting off, against the costs awarded her, the costs of a reference in which her claim for damages was disallowed. *Swift v. Swift*, 88 Hun, 551; 34 N. Y. Supp. 852; 68 N. Y. St. Repr. 749.

The widow may offer to accept a gross sum in lieu of dower, and, if her offer be accepted, the court will determine the amount of the sum, basing it upon the probable length of her life as shown by the tables of mortality.

Code Civ. Proc. § 1617. Plaintiff may consent to receive a gross sum.

In an action for dower, the plaintiff may, at any time, before an interlocutory judgment is rendered, by reason of the defendant's default in appearing or pleading, or, where an issue of fact is joined, at any time before the commencement of the trial, file with the clerk, a consent to accept a gross sum, in full satisfaction and discharge of her right of dower in the real property described in the complaint. Such a consent must be in writing, and acknowledged or proved, and certified, in like manner as a deed

to be recorded. A copy thereof, with notice of the filing, must be served upon each adverse party who has appeared, or who appears after the filing.

Code Civ. Proc. § 1618. Defendant may consent to pay it, proceedings thereupon.

At any time after a consent is filed, as prescribed in the last section, and before an interlocutory judgment is rendered, any defendant may apply to the court, upon notice, for an order granting him leave to pay such a gross sum. Thereupon the court may, in its discretion, and upon such terms as justice requires, ascertain the value of the plaintiff's right of dower in the property, by a reference or otherwise, and make an order, directing payment, by the applicant, of the sum so ascertained, within a time fixed by the order, not exceeding sixty days after service of a copy thereof; and directing the execution by the plaintiff of a release of her right of dower, upon receipt of the money. Obedience to the order may be enforced, either by punishment for contempt, or by striking out the pleading of the offending party, and rendering judgment against him or her or in both modes.

General Rule 70.

Whenever a party, as a tenant for life, or by the courtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of five per cent. on the principal sum, during the probable life of such person, according to the Carlisle Table of Mortality.

The consent of the widow filed by her during the progress

of the proceedings for dower before a referee to accept a gross sum in satisfaction of dower, did not give her such a vested right in such ascertained sum, that the suit could be carried on after her death, by her personal representatives. *McKeen v. Fish*, 33 Hun, 28, 30; *affd.* 98 N. Y. 645.

When the plaintiff has consented to accept a gross sum in lieu of dower, the defendant moved for leave to pay such sum; the referee appointed by the court had made and filed a report that plaintiff was entitled to a certain sum and the court decided to confirm the report, but before the entry of a formal order embodying such decision, the plaintiff died; it was held that the plaintiff's right was fixed and passed to her executor, who might enforce it. *Robinson v. Grover*, 138 N. Y. 425.

The failure of a widow to file her consent to accept a gross sum in lieu of dower before interlocutory judgment in an action to admeasure dower is cured by the filing of such consent prior to the entry of judgment confirming the referee's report, when it does not appear that the defendants have been prejudiced. *Freeman v. Ahearn*, 64 App. Div. 509; 72 N. Y. Supp. 326.

A testator's direction to executors to set apart and apply a fixed sum annually for the support of his wife does not, on its face, bar dower. Where such fixed sum exceeds the entire income of the estate and the widow was an incompetent person, the court refused the application of the committee to be permitted to take a gross sum in lieu of dower, as it was not for the best interests of the widow. *Matter of Grotrain*, 35 Misc. Rep. 257; 71 N. Y. Supp. 842.

A woman having only an inchoate dower in surplus moneys is not entitled to a gross sum. She can have only one-third of the moneys invested during the joint lives of herself and husband and for her own life should she survive him. *Citizens' Savings Bank v. Mooney*, 26 Misc. Rep. 67; 56 N. Y. Supp. 548.

If the widow has consented to take a gross sum and is entitled to judgment in her action for dower, the court must, if a district parcel cannot be admeasured, order a sale of the

property, from the proceeds of which the gross sum must be paid.

But if a portion of the property consists of unimproved lots the widow may elect to take a portion of the lots, which she will hold as an estate of inheritance, taking also a gross sum in the remainder of the property that is sold.

A widow takes an absolute title (not a mere life interest) in any gross sum that may be paid to her.

Code Civ. Proc. § 1619. Interlocutory judgment for sale.

Where the plaintiff's consent has been filed, as prescribed in the last section but one, and she is entitled to an interlocutory judgment in the action, the court must, upon the application of either party, ascertain, by a reference or otherwise, whether a distinct parcel of the property can be admeasured and laid off to the plaintiff, as tenant in dower, without material injury to the interests of the parties. If it appear to the court, that a distinct parcel cannot be so admeasured and laid off, the interlocutory judgment must, except in the case specified in the next section, direct that the property be sold by the sheriff, or by a referee designated therein; and that, upon the confirmation of the sale, each party to the action, and every person deriving title from, through, or under a party, after the filing of the judgment-roll, or a notice of the pendency of the action, as prescribed in article ninth of this title, be barred of and from any right, title, or interest in or to the property sold.

Code Civ. Proc. § 1620. Interlocutory judgment, directing a part to be laid off.

In a case specified in section 1617 of this act, where the property, or a part thereof, consists of one or more vacant or unimproved lots, the plaintiff's consent may contain a stipulation to take a distinct parcel out of those lots, in lieu of a gross sum. In that case, the interlocutory judgment, instead of directing a sale, may direct if it appears to be just so to do, that commissioners be appointed to

admeasure and lay off to the plaintiff a distinct parcel, out of the vacant or unimproved lots; and, if there is any other property, that it be sold, and a gross sum to be paid to her out of the proceeds thereof, as prescribed in the next three sections. The plaintiff's title to each distinct parcel, admeasured and laid off to her, as prescribed in this section, is that of an estate of inheritance in fee simple. In admeasuring and laying off the same, the commissioners must consider quantity and quality relatively, according to the value of the plaintiff's right of dower in the vacant or unimproved lots, out of which the admeasurement is to be made; which must be ascertained, in proportion to the value of those lots, as prescribed, in the next three sections, for fixing a gross sum to be paid to her out of the proceeds of a sale.

Code Civ. Proc. § 1624. Final judgment thereon.

Upon confirming the sale, the court must ascertain by a reference or otherwise, the rights and interests of each of the parties in and to the proceeds of the sale, and also what gross sum of money is equal to the value of the plaintiff's dower in the net proceeds of the sale, calculated upon the principles applicable to life annuities. The court must thereupon render final judgment, confirming the sale, and directing that the gross sum so ascertained be paid to the plaintiff, in full satisfaction of her right of dower; and that the remainder of the proceeds of the sale be distributed among the persons entitled thereto.

Where a widow claims dower in lands of which her husband was seized as tenant in common, the court can only direct the sale of the undivided interest of the husband. *Card v. Pudney*, 42 App. Div. 405; 59 N. Y. Supp. 278.

Where a widow dies before judgment in an action for dower, and an order has been made dismissing the complaint and granting an extra allowance to defendant, the personal

representative of the widow may continue the action for the purpose of reviewing the right to the extra allowance. *Armstrong v. Union College*, 55 App. Div. 302; 66 N. Y. Supp. 942.

The statute of limitations on the action for dower is twenty years, commencing with the death of the husband. The statute is not tolled by absence of defendants from the state as they may be served by publication.

Code Civ. Proc. § 1596. Limitation of action for dower.

An action for dower must be commenced by a widow, within twenty years after the death of her husband; but if she is, at the time of his death, either:

- 1. Within the age of twenty-one years; or*
- 2. Insane; or*
- 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life;*

The time of such a disability is not a part of the time limited by this section. And if at any time, before such claim of dower has become barred by the above lapse of twenty years, the owner or owners of the lands subject to such dower, being in possession, shall have recognized such claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment or decree of a court of record within the same time and concerning the lands in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband, and previous to such acknowledgment in writing or such recognition by judgment or decree, is not a part of the time limited by this section.

Statute of limitations barring dower cannot be interposed

where widow has been in possession and subsequently ousted. *Sayre v. Wisner*, 8 Wend. 661.

The limitation of an action for dower is governed wholly by section 1596 of the Code of Civil Procedure and not by section 401 of the Code, and hence the absence of the defendants from the state does not prevent the running of the statute. *Wetyen v. Fick*, 178 N. Y. 223.

An interlocutory judgment for the admeasurement of dower is not a cloud on the title after the lapse of twenty years. *Pt. Jefferson Co. v. Woodhull*, 128 App. Div. 188; 112 N. Y. Supp. 678.

CHAPTER XII.

COURTESY.

Courtesy is a life estate, (arising by operation of law) which a husband takes on the death of his wife, in all lands of which she was seized of an estate of inheritance at any time during coverture.

At common law there were four requisites to courtesy.—(1) Marriage, (2) seizin of wife, (3) issue born alive and capable of inheriting from the wife, and (4) death of wife.

Since the Married Woman's Acts a fifth contingency has been added—that is to say, the husband takes no courtesy if the wife during her lifetime or by will has made other disposition of her lands. (See ante, p. 258.)

On the happening of the first three events the courtesy is said to be initiate; on the death of the wife the courtesy, if any, is consummate.

“A tenant by the courtesy of England is where a man marries a woman seized of an estate of inheritance, that is, all lands and tenements in fee-simple or fee-tail, and has by her issue born alive which are capable of inheriting her estate. In such case, he shall on the death of his wife hold the lands for his life as tenant by the courtesy of England. * * * There are four requisites necessary to make a tenancy by the courtesy: marriage, seizin of the wife, issue, and death of the wife.” 2 Blackstone Com. 126; Jackson v. Johnson, 5 Cow. 95; Matter of Winnie, 2 Lans. 22.

Birth of issue makes the husband's title by courtesy *initiate* and the death of the wife *consummates* the estate. Matter of Winnie, 2 Lans. 22.

“To establish such tenancy (by the courtesy), there were needed four things: marriage, issue of the marriage, death

of the wife and her seizin during marriage of the premises in question." *Ferguson v. Tweedle*, 43 N. Y. 548.

Kent's definition is as follows: "Tenancy by the courtesy is an estate for life created by the act of the law. When a man marries a woman, seized at any time during the coverture of an estate of inheritance in severalty, in coparcenary, or in common; and hath issue by her born alive, which might by any possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the courtesy of England." 4 Kent Com. 28.

At common law courtesy had two stages: first, courtesy initiate; second, courtesy consummate. 2 Bl. Com. 25; 4 Kent Com. 29.

There are three requisites of courtesy initiate; first, marriage; second, seizin; third, birth of issue alive. On the happening of these three requisites the courtesy is initiate. *Matter of Winnie*, 2 Lans. 21; *Schmerhorn v. Miller*, 2 Cow. 439.

Upon the death of the wife the courtesy becomes consummate. *Jackson v. Johnson*, 5 Cow. 14.

A valid marriage is a prerequisite to courtesy. And the husband's right is cut off by an absolute divorce obtained for his fault; not so if the decree be in his favor. (See ante, pp. 97, 100.)

A marriage in order to entitle the husband to courtesy must be canonical and legal. 2 Bl. Com. 127.

But it is said that marriage may be proved by facts and circumstances such as cohabitation, etc. 8 Am. & Eng. Enc. 509.

The marriage required must be a lawful marriage, but a voidable marriage is enough to support the courtesy of the husband, unless it is actually annulled during the life of the wife. 1 Washburn's Real Prop. 129.

To give courtesy there must be issue born alive during coverture—that is to say before the death of the wife. And moreover the child must be one capable of inheriting from the mother.

!
or remark
able

As to the birth of issue, it is required that the child be born alive. 2 Bl. Com. 127; *Marcellis v. Thalhiemer*, 2 Paige, 35. This is always a question of fact. 2 Bl. Com. 127. The child must be born during the lifetime of the mother. 2 Bl. Com. 127. *Matter of Winnie*, 1 Lans. 508. And the child must be capable of inheriting the mother's estate. 2 Bl. Com. 129. Thus, under the feudal system the birth of a daughter did not give the husband courtesy in an entailed estate, because such daughter could not inherit.

The child of the marriage must be born alive in the lifetime of the mother to entitle the father to courtesy and hence, a delivery of a child alive by a Caesarean operation after the death of the wife does not give courtesy. *Marsellis v. Thalhimier*, 2 Paige, 42.

The burden of proving that the child was born alive is upon the husband claiming courtesy. *Bender v. Terwilliger*, 48 App. Div. 375; 63 N. Y. Supp. 269; *affd.* 166 N. Y. 590;

Unless the wife be seized of an estate of inheritance during coverture, there is no courtesy. It is said that actual, as distinguished from construction, seisin is necessary. It is immaterial whether the seisin be before or after birth of issue, if it be during coverture.

Actual seisin of the wife during coverture is necessary to a tenancy by the courtesy and thus where there is an outstanding estate for life, the husband cannot have courtesy, though the rule as to seisin has been somewhat relaxed in respect to wild and unenclosed lands. *Ferguson v. Tweedie*, 43 N. Y. 548; *Collins v. Russell*, 184 N. Y. 76.

"If the estate of the wife be an estate of inheritance determinable by a limitation which operates to defeat her estate at common law, the right of courtesy is gone." *Hatfield v. Sneden*, 54 N. Y. 285.

Actual possession by the wife as distinguished from constructive possession is necessary to give courtesy. *Carr v.*

Anderson, 6 App. Div. 10. See also *Collins v. Russell*, 96 App. Div. 136; 89 N. Y. Supp.; 414; *affd.* 184 N. Y. 74.

A husband cannot be a tenant by courtesy of a remainder or reversion of an expectant remainder of reversion, unless the intermediate estate ends during coverture. *Ferguson v. Tweedy*, 43 N. Y. 543; *Trolan v. Rogers*, 79 Hun, 507; 61 N. Y. St. Repr. 586; 29 N. Y. Supp. 899.

The husband does not take courtesy in that portion of his wife's land which is given to her mother as dower. *Matter of Cregier*, 1 Barb. Ch. 600.

It is not necessary that the seizin of the wife, and the birth of issue be concurrent, and it is immaterial during what time during coverture the wife becomes seized, whether before the birth of issue or thereafter, nor does it matter whether the issue be living or dead at the time of the seizin. *Jackson v. Johnson*, 5 Cow. 74.

Where a wife conveys to her mother a life interest in lands, the husband on the death of the grantee is entitled to courtesy in the reversion provided other requisites of courtesy exist. *Valentine v. Hutchinson*, 43 Misc. Rep. 314; 88 N. Y. Supp. 862.

In order to entitle a husband to courtesy his wife must be seized in fact during her lifetime as distinguished from a seizen in law, which rule applies where she acquires title by deed. Hence, where lands are conveyed to a wife subject to a life estate, the husband is not entitled to courtesy if the wife die before the termination of the precedent estate. *Collins v. Russell*, 96 App. Div. 136; 89 N. Y. Supp. 414.

As to the second requirement the rule is, that the wife must be seized of the lands during coverture. *Baker v. Oakwood*, 49 Hun, 416; 3 N. Y. Supp. 570; *affd.*, 123 N. Y. 16. At common law an actual seizen was required or a seizen in deed. *Gibbs v. Esty*, 22 Hun, 66.

But it has been said that the seizen required in modern law is not as strict as that required by the common law, and in general a husband may have courtesy in the uncultivated lands of his wife, if the wife has merely a legal seizen. *Jackson v. Sellick*, 8 Johns. 262; *Ferguson v. Tweedy*, 43 N. Y. 543. And the delivery of a deed to the wife, if there be no adverse possession, is sufficient seizen to give the husband courtesy because possession in such case follows the right to possession. *Adair v. Lott*, 3 Hill 182 (questioned in *Collens v.*

Russell, 184 N. Y. 74); *Ferguson v. Tweedy*, 43 N. Y. 543; *Jackson v. Johnson*, 5 Cow. 74.

COURTESY INITIATE.

Under the common law, courtesy initiate was in the nature of an estate in lands. This because a married woman could not convey during her lifetime, or devise her lands by will. (See ante, pp 253-254), and hence could not deprive her husband of courtesy by her own act. Moreover, he had a life estate in her lands during coverture, aside from any question of courtesy. (See ante, p. 253.)

Lord Coke says: "Albeit the estate it not consummate until the death of the wife, yet the estate has such a beginning after issue had in the life of the wife as is respected in law for divers purposes." Co. Litt. 30, A.

In *Van Duser v. Van Duser*, 6 Paige 370, the court says: "I have not been able to find any principle either of law or of equity, which can authorize this court to interfere with the husband's legal estate as tenant by the courtesy initiate in his wife's real property, so as to place it beyond his reach and the reach of his creditors."

At common law a tenant by a courtesy initiate held a freehold estate and the wife's interest was mere a reversionary interest, and the husband could alienate his courtesy initiate and was liable for his debts. *Schermerhorn v. Miller*, 2 Cow. 439.

Courtesy initiate was a legal estate in the husband which was subject to his debts. *Wickes v. Clarke*, 8 Paige, 172; *Ellsworth v. Cook*, 8 Paige, 646. The husband's courtesy could be sold on execution against him. *Schermerhorn v. Miller*, 2 Cow. 439.

Irrespective of any question of courtesy a husband by virtue of the marriage took at common law an immediate vested interest in his wife's freehold estate for their joint lives unless she held the same as a separate estate. *Van Duser v. Van Duser*, 6 Paige, 370.

At common law a wife could not convey unless her husband joined in the deed and hence she had no means to defeat his courtesy should he survive her.

All this has been changed by the Married Woman's Acts.

EFFECT OF MARRIED WOMAN'S ACTS.

The husband's right to courtesy while not cut off by the Married Woman's Acts, has been reduced to a mere possibility. That is to say, a wife may convey her lands during her lifetime without her husband's consent, or devise them by will, free of his courtesy. But should she fail to do so, he takes courtesy if the common law requisites exist.

At first there was some doubt as to the effect of the Married Woman's Acts upon the husband's right to courtesy. The Court of Appeals says: "After sundry conflicting decisions the law has become substantially settled that while those acts excluded the husband during life from the control of or interference with his wife's real and personal estate, and gave to her alone the power of disposition by deed or will, yet they left the husband the right of courtesy in her real property and of administration, for his own benefit, of her personalty in so much as remained at her death undisposed of as unbequeathed. Citing *Matter of Winnie*, 2 Lans. 21, *Ranson v. Nichols*, 22 N. Y. 110; *Barnes v. Underwood*, 47 N. Y. 351.

"Since the acts allowing married women to sell and devise their lands, a husband's right as tenant by the courtesy initiate as to lands acquired since the passage of those acts consists merely of a status, which is never a vested right and is not separately alienable during coverture but may be modified or annulled at any time before it becomes consummate by the death of the wife. While merely initiate it is not an estate but a simple possibility or expectancy like that of an heir apparent. Either may be destroyed at will by the owner of the fee. As it is not coupled with any interest in the

property it cannot be made the subject of a mortgage or transfer. 'It is common learning in law that a man cannot grant or charge that which he hath not.' Like 'The next cast of a fisherman's net,' it involves a possibility but no actual or potential interest." *Albany County Savings Bank v. McCarthy*, 149 N. Y. 85.

Thus, it is said "Courtesy initiate upon the birth of a child which was a vested estate in the husband has been destroyed by the statute giving a married woman the right to dispose of her separate estate by deed or devise." *Collins v. Russell*, 96 App. Div. 137; 89 N. Y. Supp. 414.

See also, *Hatfield v. Sneden*, 54 N. Y. 280; *Bertles v. Nunan*, 92 N. Y. 160; *Leech v. Leech*, 21 Hun, 381. It will be seen, therefore, that under the law of New York State, courtesy initiate cannot be sold by the husband, nor liable for his debts.

"This power of disposition (by the wife), makes such right contingent and as much so as that of one who may be the heir and take by descent lands which his ancestor may leave undisposed of at his death. Such fact furnishes no interest to the heir apparent in the event of an action in the lifetime of the latter respecting his title to lands because it cannot be said that he has any certain or vested interest. Tenancy by the courtesy initiate ceases to be a certain interest in lands thereafter acquired when the statutes permitting the wife to dispose of her estate depend upon the legislative power. * * * This was in effect a modification of the laws of inheritance, entirely within the control and direction of the legislative power." *Matter of Mitchell*, 61 Hun, 378; 41 N. Y. St. Repr. 131; 16 N. Y. Supp. 180.

A wife in order to convey her inchoate dower must join in her husband's deeds, but, since the Married Woman's Acts, a wife may convey her lands free from her husband's courtesy, although he does not join in the conveyance. *Albany Savings Bank v. McCarthy*, 149 N. Y. 85.

In an earlier case erroneously holding that an estate by the courtesy was entirely abolished by the Married Woman's Acts, the court in arguing to that end states "What kind of an estate of courtesy then would that be that the wife at her will and pleasure can convey, devise and destroy? If it is vested, she cannot destroy it. * * * I think the conclusion irresistibly follows that the statute which allows the

wife to sell and convey a perfect title to real estate during coverture, after seizin and birth of issue with like effect as if she was unmarried, has abrogated the estate of courtesy therein. Or if it has been held that it has only modified it, it is so far modified that it has not the dignity of an estate, even equal to that of a chattel real, and could not be levied upon or sold on execution." *Billings v. Baker*, 28 Barb. 368.

Power of Legislature to modify or abolish courtesy.

It was held by the Court of Appeals that the Married Woman's Acts are not open to the objection of impairing the obligations of a contract because they defeat the expectation which the father of the living child had previous to these acts, of being tenant by the courtesy in lands acquired by his wife during coverture and subsequent to those acts. *Thurber v. Townsend*, 22 N. Y. 517.

But it was held that the rights of a husband acquired prior to the "Married Woman's Acts" were not affected thereby. *Smith v. Colvin*, 17 Barb. 160.

This principle was subsequently reiterated but it was said that the nature and extent of a husband's interest in any lands acquired by the wife subsequent to the said statutes were subject "to any change which the legislature might thereafter make in the laws relating to the acquisition, disposition and enjoyment of property." *Matter of Mitchell*, 61 Hun, 378; 41 N. Y. St. Repr. 131; 16 N. Y. Supp. 180; citing *Sleight v. Read*, 18 Barb. 159.

But the husband's courtesy, once consummated by the death of the wife becomes a vested life estate. He holds it subject to all the rights and obligations incident to other life tenancies.

On the death of the wife the courtesy becomes consummate. "There can be no such thing as a tenant by the courtesy until the death of the wife." *Matter of Winnie*, 2 Lans. 23.

Upon the death of the wife, however, without having disposed of her real property either by deed or will, the courtesy of the husband becomes consummate and is an estate for life. It differs from dower in that it vests immediately in the husband, the same as property vests immediately in an heir. In dower, it will be remembered, the portion has to be allotted to the widow. See *Adair v. Lott*, 3 Hill 182; *Mack*

v. Roach, 13 Daly 103. Courtesy consummate is liable for the husband's debts and he may convey or mortgage his life estate. He is liable, however, for waste.

A tenancy by the courtesy is merged in a higher title. Berger v. Waldbaum, 46 Misc. Rep. 4; 93 N. Y. Supp. 352;

CHAPTER XIII.

PARENT AND CHILD.

RIGHT TO CUSTODY: HABEAS CORPUS.

Parents, by the law of nature, and by Municipal law, have the primary right to the custody of their children during minority.

The common law recognized the right of the father only (the mother's rights were limited to reverence by the child); but, under the statute, the mother and father have equal rights.

Domestic Relations Law. § 81 (in part).

A married woman is the joint guardian of her children with her husband, with equal powers, rights and duties in regard to them.

"The legal power of a father,—for the mother as such is entitled to no power but only to reverence and respect; the power of a father, I say, over the persons of his children ceases at the age of 21 years; for they are then enfranchised by arriving at years of discretion." 1 Bl. Com. 453.

The father's guardianship by nature continues until the child has arrived at full age. 2 Kent Com. 193.

In England parents have a right to decide upon the religion in which their children will be educated, but there seems to be no rule on the subject in the United States. See *People v. Gates*, 43 N. Y. 40, where the court refused to take a child from the Shakers on account of religious beliefs.

As section 81 of the Domestic Relations Law makes a married woman joint guardian of her children with her hus-

band, with equal powers, rights and duties, the husband cannot give the custody of his children to third persons without her consent. *People ex rel. Beaudoin v. Beaudoin*, 126 App. Div. 505; affirmed, 193 N. Y. 611.

A father unable to provide for his infant child, may by contract in writing transfer the custody, control and the right to the services of such child to another, subject to the right of the court to interfere in the interest of the child. *Middleworth v. Ordway*, 191 N. Y. 404.

Mere parental authority does not justify the confinement of a son in a mad house. *People ex rel. Bebro v. Bond*, 104 App. Div. 47; 93 N. Y. Supp. 277.

"Protection * * * is also a natural duty [of a parent]; but rather permitted than enjoined by any municipal law; nature in this respect working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their law suits without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the person of his children." 1 Bl. Com. 450.

When parents are wrongfully deprived of the custody of a child the remedy is by habeas corpus.

The writ was always available as against third persons; but, by statute, it may be invoked to determine the question of custody as between the parents themselves, where they have separated without divorce.

Domestic Relations Law. § 70. Habeas corpus for child detained by parent.

A husband or wife, being an inhabitant of this state, living in a state of separation, without being divorced, who has a minor child, may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order.

Domestic Relations Law. § 71. Habeas corpus for child detained by Shakers.

If it shall appear on such application, or the return of the writ, that the husband or wife of the applicant has become attached to the society of Shakers, and detains a child of the marriage among them, and that such child is secreted or concealed among them, the court may issue a warrant in aid of such writ of habeas corpus, directed to the sheriff of the county where the child is suspected to be, commanding such sheriff, in the day time, to search the dwelling-houses and other buildings of such society, or of any members thereof, or any other building specified in the warrant, for such child, and to bring him before the court, and the sheriff must forthwith execute such warrant.

“The father may obtain the custody of his children by the writ of *habeas corpus* where they are improperly detained from him; but the courts both of law and of equity will investigate the circumstances and act according to sound discretion and will not always and of course interfere upon *habeas corpus* and take a child though under 14 years from the possession of a third person and deliver it to the father against the will of the child.” 2 Bl. Com. 194.

The common-law writ lies under section 2015 of the Code Civil Procedure to determine the right to the custody of an infant. *People ex rel. Pruyne v. Walts*, 122 N. Y. 238.

The sections of the Domestic Relations Law, 70 and 71, permitting *habeas corpus* to determine the right to custody of a child detained by parents or detained by Shakers, are merely provisions in addition to the special proceeding of *habeas corpus* to inquire into the cause of detention. The proceeding of *habeas corpus* to inquire into the cause of detention will be found in the Code of Civil Procedure, §§ 1991-2064. Under these sections any person having a right to the custody of a child may have the writ to obtain possession, as for example, a grandfather. *In re Riemann*, 31 N. Y.

St. Repr. 13, 10 N. Y. Supp. 516. Such writ is of frequent use where children are detained from their parents or guardians upon the ground that absence from legal custody is equivalent to illegal restraint and imprisonment. It is thus seen that the above two sections of the Domestic Relations Law must be merely considered as widening the scope of the common-law writ, and allowing the right as to custody to be determined as between parents. For the common-law writ, as now governed by the Code, see 1 Fiero on Special Proceedings (2d ed.), 56.

Separation essential.

The power conferred upon the court by section 70 will only be exercised in cases of separation of husband and wife by judicial decree or by mutual consent, and not where the wife, of her own accord, without justifiable cause, withdraws herself from the protection of her husband. *People v. —*, 19 Wend. 16.

In order to warrant the court in exercising the purely discretionary power conferred by the provisions of this section it must be shown that the wife had good and substantial grounds for leaving her husband, but it is not necessary that such grounds be sufficient to enable her to obtain a decree of divorce from him. Where it appears that the wife was morally justified in leaving her husband, that she is a woman of refinement and education, is personally and pecuniarily competent to take charge of her children who are of tender years, a case is presented which justifies the court in awarding to the wife the custody of the children. *People ex rel. Sternberger v. Sternberger*, 12 App. Div. 398.

Where the wife has separated from her husband without any sufficient cause, she ought not to have the custody of her child, unless the health and present condition of the child imperatively demand it. *People v. Humphreys*, 24 Barb. 521.

If the parents be equally fit to have the custody of their children, the common law precedence of the father prevails, except where the children are of tender years. But the welfare of the child is paramount. (See post, p. 216.)

While under section 70 of the Domestic Relations Law, the court has power to award the custody of a child either to the mother or to the father, the common-law rule that the husband is the head of the household and entitled to the care and custody of his children still obtains and he is entitled to their custody where the husband and wife have voluntarily separated unless it is against the interest of the child. The rule is to the contrary where the custody of infants of tender years is involved as the nurture and care of such infants devolve upon the mother by the law of nature. *People ex rel. Sinclair v. Sinclair*, 91 App. Div. 322; 86 N. Y. Supp. 539.

The father is entitled to the custody of his infant children, and where differences exist between the parents the right of the father is preferred to that of the mother; but he may forfeit it by misconduct, may be controlled in the exercise of his parental power and under certain circumstances, the care and custody of the children may be committed to the mother. *People v. Chegaray*, 18 Wend. 637; *People v. —*, 19 Wend. 16; *People v. Mercein*, 3 Hill, 399; *Ahrenfeldt v. Ahrenfeldt*, Hoff. Ch. 477; *People v. Olmstead*, 27 Barb. 9; *People v. Humphrey*, 24 Barb. 521.

Where parents who have separated are equally fit as custodians of a son five years old, his custody will be awarded to the father by reason of his paramount right. *People ex rel. Sinclair v. Sinclair*, 47 Misc. Rep. 230; 95 N. Y. Supp. 861.

The statute does not declare on what grounds a court shall proceed, but confides the whole matter to its discretion, and hence the occasion, cause and circumstances of the separation and the relative merits and demerits of the parties may be taken into account. *People v. Brooks*, 35 Barb. 85, 89.

A mother after the death of her husband has a paramount right to the custody of her children as against persons to whom the husband has given the custody, if she is of good character and able to care for her children, even though the custodians named by the husband are in better financial circumstances and hold the child in affectionate regard. *People ex rel. Beaudoin v. Beaudoin*, 126 App. Div. 505; 110 N. Y. Supp. 592; affirmed, 193 N. Y. 611.

The rights of parents must yield in all cases to the welfare of the child, which is the chief point of inquiry wherever the right to custody is involved.

The moral and educational welfare of the child is considered as well as his material advantages.

The jurisdiction of the court upon *habeas corpus* to secure the custody of an infant child is equitable in its character and the welfare of the child is the chief object to be attained and must be the guide for the judgment of the court. *People ex rel. Pruyne v. Walts*, 122 N. Y. 238.

The Supreme Court in its chancery powers may entertain a proceeding by a parent to obtain the custody of a child instituted by petition. In such proceeding the welfare of the child is controlling. Where by a prior decree it has been established that the mother of the child was not justified in abandoning her husband and had not conducted herself as a dutiful wife and mother, and it appears that she is without means to support the child, the father will be awarded custody. *Matter of Tierney*, 128 App. Div. 835; 112 N. Y. Supp. 1039.

On *habeas corpus* to determine the custody of male children not of tender years, pending an action for divorce, they will be given to the father where it appears that the mother is indiscreet, intemperate of speech and associates with persons of bad character, while the father is living in refined surroundings. *People ex rel. Lawson v. Lawson*, 111 App. Div. 473; 98 N. Y. Supp. 130.

Parents have equal rights to the possession of their children and where after a separation the mother alone has con-

tributed to their support and they are being educated in a foreign country, the court will not grant a writ of *habeas corpus* on the relation of the father to compel the mother to produce the children. *People ex rel. Duryee v. Duryee*, 109 App. Div. 533; 96 N. Y. 371; *revd.* on other grounds, 188 N. Y. 440.

The real question in a controversy between a husband and wife who have separated, over the care and custody of an infant child, is not what are the legal rights of the father or of the mother to the custody of the child, or whether the right of one is superior to that of the other, but what are the rights of the child, and what is required in respect to its custody by its own best interests. *Matter of Harman*, 23 Week. Dig. 128.

In determining as to the custody of children, the interest of the child is the chief consideration, even where the mother is solely in fault, the age, sex or health of the child may make it the duty of the court to leave it in her custody. *Matter of Maurer*, 18 Week. Dig. 568.

Where a *habeas corpus* is directed to a private person to bring up an infant, the court is bound to set the infant free from improper restraint; but whether they shall direct the infant to be delivered over to any particular person, even to the father, rests in their discretion. *Matter of McDowle*, 8 Johns. 328; *Matter of Waldron*, 13 Johns. 418; *People v. Mercein*, 8 Paige, 47; *People v. Olmstead*, 27 Barb. 9.

The wishes of the child will be considered, but are not controlling.

A father will not be deprived of the custody of his daughter on *habeas corpus* where she is 18 years of age and desirous of living with her father and the charge that he is living in adultery is not supported by the evidence. *People ex rel. Bishop v. Bishop*, 117 App. Div. 445; 102 N. Y. Supp. 592.

Where a father forces his daughter into a distasteful marriage at the age of sixteen, and where such marriage was annulled, and of her own will she took up residence with a stranger, it was held that she would not be compelled upon *habeas corpus* proceedings to abandon her home of adoption and return to her father. There was no evidence that her

reputation had suffered or was affected by the change of residence. *People ex rel. Oprandy v. Ciarcia*, 49 App. Div. 90; 63 N. Y. Supp. 497.

Where a mother gave the custody of her daughter nine months old to other persons who cared for her and educated her until she was eleven years of age, and the child desires to continue to live with her custodians the court will not award the custody to the mother for the purpose of taking the child with her to a distant state although there be no evidence that she is unfit. *People ex rel. Humex v. Phelps*, 58 Misc. Rep. 625; 109 N. Y. Supp. 943.

The welfare of a child is the chief concern of the court in determining the respective rights of the parents to its custody. Where a child eleven years of age admits an equal love for both parents, little weight will be attached to his preference. *People ex rel. Elder v. Elder*, 98 App. Div. 244; 90 N. Y. Supp. 703.

If both parents be unfit, the custody of a child may be given to other relatives, or to third persons.

The Supreme Court in its equitable powers, acting for the welfare of an infant, may take its custody from one legally entitled thereto and give it to another. *People ex rel. Beaudoin v. Beaudoin*, 126 App. Div. 505; 110 N. Y. Supp. 592; affirmed, 193 N. Y. 611.

Considerations affecting the health and welfare of the child may justify a court in withholding the custody of it temporarily, even from its legal guardians; and they are so purely matters of discretion with the court of original jurisdiction that the appellate court will not review the conclusions thereon unless some manifest error or abuse of discretion is made to appear. *Matter of Welch*, 74 N. Y. 299; *People v. Manly*, 2 How. Pr. 61; *Matter of Watson*, 10 Abb. N. C. 215; *People ex rel. Wehle v. Weissenbach*, 60 N. Y.

385; *Matter of Riemann*, 31 N. Y. St. Repr. 13; 10 N. Y. Supp. 516.

Where a husband and wife separated, and by mutual consent the husband's mother took the child home and cared for her well up to the time of beginning the *habeas corpus* proceedings, when the child was nearly seven years, it was held that, as the welfare of the child was the most important consideration, she would not be removed from her grandmother, her mother being destitute and having previously neglected the child. *Matter of Reynolds*, 28 N. Y. St. Repr. 538; 8 N. Y. Supp. 172.

Commitment to reformatory.

A proceeding for the commitment of destitute children, under section 486 of the Penal Law is not a criminal proceeding. The child committed under such section may be restored to its parents by virtue of the general chancery jurisdiction where the parents have reformed and are able to care for the child, even without the consent of the institution. The chancery powers of the court in this respect seem only to be limited by the necessities of the case, having due regard for the welfare of the child. The same rules exist as to the discharge of children from custody under the Poor Law. *Matter of Knowack*, 158 N. Y. 482.

Where an infant has been committed to a house of industry, the court cannot review such commitment when made by a competent tribunal upon returns to writs of *habeas corpus* and *certiorari*, the remedy being by appeal taken under section 749 of the Code of Criminal Procedure. *People ex rel. Stern v. New York Society, etc.*, 27 Misc. Rep. 457; 58 N. Y. Supp. 118.

Habeas corpus does not lie to obtain possession of a child which is held by virtue of a commitment made by a magistrate. *People ex rel. Sampson v. New York Catholic Protectory*, 93 App. Div. 196; 87 N. Y. Supp. 557.

The court will not restore a child to its parents where it has been committed to a reformatory and the reformation has not yet been accomplished. *Matter of Bresloff v. Jewish Society*, 60 Misc. Rep. 327; 113 N. Y. Supp. 254.

Although a writ of habeas corpus has been denied, the application may be renewed if warranted by a change of circumstances.

The only proceeding at common law to inquire into the custody of children is by *habeas corpus*. Upon the issue of a new writ in another proceeding for the custody of children the relator is always at liberty to show that a new condition of things has arisen and is not bound by a former adjudication. *People ex rel. Keater v. Moss*, 6 App. Div. 414; 39 N. Y. Supp. 690.

The decision of a judge on *habeas corpus*, refusing to transfer the custody of an infant child from its mother to its father, is at most only conclusive in respect to facts and circumstances then existing, and not as to such as arise afterwards. *People v. Mercein*, 3 Hill, 399.

In an action for a separation, each party claiming abandonment by the other, the court having decided that there was no abandonment on the part of either, it appeared that in a previous proceeding by *habeas corpus*, the custody of the children had been awarded to the wife. It was held that this question could only be passed upon in another proceeding of the same character in which it should be shown that the conditions had altered since the prior decision. *Simon v. Simon*, 6 App. Div. 469; 39 N. Y. Supp. 573; *affd.* 159 N. Y. 549.

It is an abuse of discretion to permit a woman, against whom a decree of divorce has been rendered for gross misconduct, access to children placed in the custody of the husband, where several similar applications have been denied. *Powers v. Powers*, 119 App. Div. 436; 104 N. Y. Supp. 94.

The writ of habeas corpus may issue although the child is without the jurisdiction; but it seems the ability of the respondent to produce the child must be shown, and that there can be no award of custody until the child is actually before the court.

The Supreme Court has jurisdiction to issue *habeas cor-*

pus to inquire into the cause of a person's detention, notwithstanding that it appears in the petition that such person is not within the state, if it be shown that the respondent may have the power to produce such person. But if it appears affirmatively that it is physically impossible for the respondent to obey the writ, it will be vacated and the petitioner left to his remedy in another state, or to the criminal law. *People ex rel. Billotti v. New York Asylum*, 57 App. Div. 383; 68 N. Y. Supp. 279; reversing 100 N. Y. St. Repr. 157.

Where the return to a writ of *habeas corpus* sued by a husband to obtain possession of his child from his wife, alleges that the child is in New Jersey, and no traverse is interposed to such allegation, the mother cannot be adjudged guilty of contempt for failing to produce the child as commanded by the writ. *People ex rel. Winston v. Winston*, 31 App. Div. 121; 52 N. Y. Supp. 814.

It seems that until the child is actually produced before the court on *habeas corpus* and is within its jurisdiction, there can be no adjudication as to the custody of the child. *People ex rel. Winston v. Winston*, 31 App. Div. 121; 52 N. Y. Supp. 814.

Where a mother, unable to support her infant child, had it committed to an asylum for a period of two years, and upon the expiration of that time sues out a writ of *habeas corpus* to obtain custody of the child, and the corporation makes return stating that the child has been indentured to a person in Illinois and is without the state and without the custody or control of defendant, which latter fact is denied in the traverse, it is error for the court to make an order requiring the corporation to deliver the child to the custody of the relator without taking proof as to whether the corporation will be able to comply with the order. *People ex rel. Dunlap v. New York Asylum*, 58 App. Div. 133; 68 N. Y. Supp. 656.

Where a mother, being the actual custodian of her child, after a divorce for abandonment, which made no disposition of the child, establishes a domicile in this state and maintains the same for four years, her civil status establishes that of the child and a foreign court

has no power while she and the child are temporarily in that state to regulate the relations between them upon *habeas corpus*. People v. Dewey, 23 Misc. Rep. 267; 50 N. Y. Supp. 1013.

Jurisdiction; Practice, etc.

The statute, does not confer upon a county judge any authority to entertain proceedings by *habeas corpus* in behalf of a wife living in a state of separation from her husband, respecting the custody of a minor child. The Supreme Court alone, not a justice of that court, is invested with the power. People v. Humphrey, 24 Barb. 521; People ex rel. Ward v. Ward, 59 How. Pr. 174; People ex rel. Hoyle v. Osborne, 6 Civ. Proc. Rep. 299; People ex rel. Parr v. Parr, 49 Hun, 473; 18 N. Y. St. Repr. 15; 2 N. Y. Supp. 263; affirmed, 121 N. Y. 679.

Where a daughter 18 years of age marries prior to the confirmation of a report in proceedings for a writ of *habeas corpus* to deprive her father of her custody, the court has no power to make a *nunc pro tunc* order depriving the father of custody. People ex rel. Bishop v. Bishop, 117 App. Div. 445; 102 N. Y. Supp. 592.

On an inquiry as to the proper custody of a child, with reference to his own welfare, evidence of the father's violence to the mother is relevant. Matter of Pray, 60 How. Pr. 194.

Where a *habeas corpus* is sued out on the application of a mother, on the coming in of the return, denials of material facts set forth in the return, and new allegations in support of the application will be received, provided the same be made under oath; but in such case the father will be allowed to give further evidence on his part. People v. Chegary, 18 Wend. 637.

Costs.

Proceedings on *habeas corpus* are special proceedings and costs are allowable in the discretion of the court. Matter of Barnett, 11 Hun, 468.

A non-resident relator suing out a writ of *habeas corpus* for the custody of his child, cannot be required to give security for the costs. People ex rel. James v. Soc. for Prevention of Cruelty to Children, 19 Misc. Rep. 677; 44 N. Y. Supp. 1100.

On *habeas corpus* brought by a mother to obtain the custody of a daughter 19 years of age whom she had allowed to work for the respondent as a domestic servant, it is improper to charge the respondent with costs without permitting him to be heard.

In such case while the daughter should be discharged from any restraint, she should not in view of her age and the circumstances be committed to the custody of her mother. People ex rel. Watson v. Buffett, 75 App. Div. 365; 78 N. Y. Supp. 175.

PARENT'S DUTY OF MAINTENANCE.

A parent, or one who assumes that relation towards a child, is under a duty to support him during minority.

This duty is said to arise through the law of nature; but at common law was only enforced while the child was of tender years, except when he became a charge upon the parish.

As to the application of the child's estate to his own maintenance, see, post, pp. 410, 412.

"The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation to endeavor as far as in them lies that the life which they have bestowed shall be supported and preserved." 1 Bl. Com. 447.

"The wants and weaknesses of children render it necessary that some person maintain them and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law." 2 Bl. Com. 189.

"The obligation of parental duty is so well secured by the strength of natural affection that it seldom requires to be enforced by human laws. According to the language of Lord Coke it is 'nature's provision to assist, maintain and console the child.'" 2 Kent Com. 190.

"No person is bound to provide a maintenance for his issue unless where the children are impotent and unable to work through infancy, disease or accident and then is only obliged to find them with necessaries. * * * For the policy of our laws, which are very watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence." 1 Bl. Com. 449.

Speaking of the duty of a mother to support her children the court in *Furman v. Van Sise*, 56 N. Y. 435 says: "That parents are bound to provide for and maintain their infant offspring results from the law of nature and is enforced upon both according to their ability; primarily during their joint lives upon the father, he generally having more ample means applicable to the purpose; but after the death of the father the same law casts this duty solely upon the mother, who must if of sufficient ability, maintain, educate and take care of her infant children. As a result of this obligation she is entitled to the custody and control of such children."

A husband is not bound to maintain his wife's children, especially her illegitimate children, born before his marriage. *Overseers of the Poor v. Cox*, 7 Cow. 235.

A parent is under no obligation to support an adult child unless he be an invalid or insane. *Cromwell v. Benjamin*, 41 Barb. 558; *Alger v. Miller*, 56 Barb. 227.

If one assume the position of parent to a child, which is not his own, he thereby assumes the domestic relation and is liable as if he were the father; thus, though a man is under no obligation to support a step-child, yet if he receives him, educates him and supports him, he is entitled to claim the wages of such child. *Williams v. Hutchinson*, 3 N. Y. 312; *Hill v. Hanford*, 11 Hun, 538. And he may recover damages for injury to such child. *Bartley v. Richtmeyer*, 4 N. Y. 38.

ABANDONMENT OF CHILDREN.

By statute, a person who abandons, or threatens to abandon, his children (or wife), without adequate support, or neglects to provide for them, may be convicted as a disorderly person. He may be compelled to give security for their support and be punished if he fail to do so.

This statute (first enacted in the time of Elizabeth), is designed solely to prevent the wife and children from becoming a charge upon the public.

Although having no logical connection with the subject of Parent and Child, the offense of abandoning a wife will be here treated in order to avoid repetition of the statutory provisions and the decisions thereunder.

Code Crim. Proc. § 899 (in part). Abandonment; Disorderly Conduct.

The following are disorderly persons:

1. *Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;*
2. *Persons who threaten to run away and leave their wives or children a burden upon the public.*

The various steps in the proceeding, and the relief to be obtained are set forth in the following §§ 900 to 913, Code Crim. Proc. but are not here printed, being beyond the scope of this work. Other penal statutes relating to the subject are the following.

Penal Law. § 480 (in part). Abandonment of children.

A parent or other person charged with the care or custody for nurture or education of a child under the age of sixteen years, who abandons the child in destitute circumstances and wilfully omits to furnish necessary and proper food, clothing or shelter for such child is guilty of felony, punishable by imprisonment for not more than two years, or by a fine not to exceed one thousand dollars, or by both. In case a fine is imposed the same may be applied in the discretion of the court to the support of such child. Proof of the abandonment of such child in destitute circumstances and omission to furnish necessary and proper food, clothing or shelter is prima facie evidence that such omission is wilful.

Penal Law. § 481. Abandonment of child under fourteen years.

A parent, or other person having the care or custody, for nurture or education, of a child under the age of fourteen years, who deserts the child in any place, with intent wholly to abandon it, is punishable by imprisonment in a state prison for not more than seven years.

Penal Law. § 483 (in part). Unlawfully omitting to provide for child.

A person who:

1. *Wilfully omits, without lawful excuse, to perform a duty by law imposed upon him to furnish food, clothing, shelter or medical attendance to a minor, or to make such payment toward its maintenance as may have been required by the order of a court or magistrate when such minor has been committed to an institution; * * * is guilty of a misdemeanor.*

“It is a principle of law that there is an obligation on every man to provide for those descended from his loins; and the manner in which this obligation shall be performed is thus pointed out. The father and mother, grandfather and grandmother of poor impotent persons shall maintain them at their own charges if of sufficient ability according as the quarter session shall direct and if a parent runs away and leaves his children, the church wardens and overseers of the parish shall seize his rents, goods and chattels and dispose of them toward their relief.” 1 Bl. Com. 448.

By the English statutes of 43 Eliz. and 5 Geo. I. “the father and mother, being of sufficient ability, of any poor, blind, lame, old, or decrepid person whomsoever, not being able to maintain himself, and becoming chargeable to any city or town, are bound, at their own charge or expense, to relieve and maintain every such person, in such manner as the overseers of the poor of the town shall approve of, and the court of general sessions shall order and direct.” 2 Kent Com. 190.

The Statute authorizing the prosecution of a husband for failure to support his wife was not enacted to settle matrimonial difficulties or as a substitute for an action for a separation. *People v. De Wolf*, 133 App. Div. 879; 118 N. Y.

Supp. 75; *People v. Demos*, 115 App. Div. 410; 100 N. Y. Supp. 968.

The purpose of the proceeding is to prevent the wife and children from becoming a burden upon the public. *Goetting v. Normoyle*, 191 N. Y. 368.

The statute providing for proceedings against a person as disorderly for abandoning his wife without support is summary and penal and should be strictly construed. It is of a criminal nature and it is incumbent upon the People to prove the charge. The abandonment contemplated by the statute means a wilful and voluntarily separation by the husband from the wife without justification. There is no abandonment within the meaning of the statute where the husband lives apart from the wife in obedience to a judgment of separation from bed and board obtained upon her suit. The common-law obligation to support is modified by such separation so that it cannot be enforced by proceedings for attachment under the statute, even if the decree makes no provision for support. *People ex rel. Commissioners v. Cullen*, 153 N. Y. 629.

Though husband and wife have each been adjudged guilty of adultery, in an action for divorce, the husband is still bound to support the wife, and may be convicted as a disorderly person for refusing to support her. *People ex rel. Kellar v. Schrady*, 24 Misc. Rep. 532; 53 N. Y. Supp. 964.

What constitutes support.

A husband cannot be made a vagrant and a disorderly person and held amenable to this statute by not complying with any condition in respect to support which the wife may see fit to impose, and the reasonableness of the condition cannot be referred to the decision of a jury. The husband has a right to select his own residence, and the support the statute was intended to secure is the necessities of life, or such as the party had been accustomed to and the husband is able to provide. This summary statute was designed to enforce actual physical support only, not to interfere with the marital relation, and when such support is tendered the husband cannot be made liable under

it, although he has been guilty of acts entitling the wife to an absolute divorce. *People v. Pettit*, 74 N. Y. 320.

The duty is upon the husband to provide suitable support for his wife. If he has been and continues ready, and in due time offers in good faith to do so, he has a defense against the charge of breach of the condition of the undertaking. The matter of association, other than that it be respectable, is not a controlling element to be considered upon a question of this character. With the husband is the right to select, as well as the duty to provide, a home for his wife; and in that respect his judgment, fairly exercised, must govern, in so far as to relieve him from the charge of being a disorderly person. *Lutes v. Shelley*, 40 Hun, 197.

In defining the words "adequate support" and the words "according to their means," found in the statute, reference may be had to the rules of law existing before the statutes. Such rule is laid down as follows: The husband was bound to furnish a wife's necessities or support suitable to her station and his condition in life. *Bulkley v. Boyce*, 48 Hun, 259; 17 N. Y. St. Repr. 940.

In the prosecution of defendant as a disorderly person for failing to support his wife, evidence which would justify a finding that he had actually abandoned his wife without adequate support will not justify the magistrate in finding him guilty as a disorderly person in that "he did leave his wife in danger of becoming a burden upon the public." *People v. Miller*, 30 Misc. Rep. 355; 63 N. Y. Supp. 949.

A husband who deserts his wife and children may be convicted as a disorderly person although his deserted wife admits that she will not live with him because he has infected her with a venereal disease. *People v. Palminteri*, 119 App. Div. 82; 103 N. Y. Supp. 1068.

A husband cannot be convicted as a disorderly person for a failure to support his wife, if it appear that the wife left him without adequate cause. *People v. De Wolf*, 133 App. Div. 879; 118 N. Y. Supp. 75.

A conviction as a disorderly person for abandonment of a wife will be reversed if it appear that the wife has property and is earning a living so that there is no danger of her becoming a charge upon the public. *People v. De Wolf*, 133 App. Div. 879; 118 N. Y. Supp. 75.

A husband cannot be adjudged a disorderly person for abandoning his wife, where it appears that the parties separated in a foreign state and the husband refused to support the wife when she followed him here, if it do not appear which of the parties was to blame for the separation. *People v. Crouse*, 86 App. Div. 352; 83 N. Y. Supp. 812.

Abandonment of Child: Penal Law.

The crime of abandoning a child under sixteen years of age in

destitute circumstances, etc., contrary to section 480 of the Penal Law differs from the offense treated in section 287 of the Penal Code (Penal Law § 481), which makes it a crime to desert a child under the age of 14 years, in any place with the intention of wholly abandoning it. The latter section applies to the abandonment of a child under circumstances which render it probable that the life or health of the child may be imperilled. *People v. Lewis*, 132 App. Div. 256; 116 N. Y. Supp. 893.

A father who after a quarrel with his wife leaves his infant children with their mother, is not guilty of desertion and abandonment within the meaning of section 481 of the Penal Law. In order to convict under said section it must be shown that the child was deserted in a "place" and left with an intent wholly to abandon it. *People v. Joyce*, 112 App. Div. 717; 98 N. Y. Supp. 863; *affd.* without opinion, 189 N. Y. 518.

In order to constitute the crime of abandoning a child, both the abandonment of the child in destitute circumstances and a failure to provide must exist, although it is not essential that both should coincide as to time. *People v. Lewis*, 132 App. Div. 256; 116 N. Y. Supp. 893.

Failure to provide medical attendance.

Although a parent at common law was under no obligation to furnish medical attendance for his child, that obligation is created by the statute. (Penal Law, § 482 *supra.*) While the statute making it a misdemeanor to fail to furnish medical attendance to a minor, does not specify the persons upon whom that obligation rests, the requirement is laid upon persons under a common law duty of caring for a minor, such as parents, guardians, foster parents, or those who have assumed the relation *in loco parentis*. But a parent need not call in a physician for every trifling complaint; he is entitled to use a reasonable amount of discretion as to whether a physician is necessary. *People v. Pierson*, 176 N. Y. 201.

The medical attendance which a parent or one *in loco parentis* must furnish to a child under this statute is the attendance of a regularly licensed physician, and does not authorize the employment of a layman who believes that he can cure sickness by prayer. *People v. Pierson*, 176 N. Y. 201.

The duty to support adult children does not exist except by statutory enactment. Thus a father is not liable for medical attendance furnished to his adult daughter who is married. *Crane v. Baudouine*, 55 N. Y. 258.

A mother by asking a physician to attend her married daughter with the acquiescence of the husband does not become personally liable

for the services rendered, in the absence of an express agreement to pay. *Macguire v. House*, 126 App. Div. 637; 111 N. Y. Supp. 153.

PARENTS' LIABILITY FOR NECESSARIES.

While parents must support a minor child they are not liable for necessities furnished to the child by third persons, unless there be an express or implied promise to pay.

"The father is not bound by the contract or debts of his son, even for articles suitable and necessary, unless an actual authority be proved or the circumstances be sufficient to imply one. Were it otherwise, a father who had an imprudent son might be prejudiced to an indefinite extent." 2 Kent Com. 192.

"The general proposition seems to be well settled that a father cannot be held liable for support or necessities furnished to his minor child by strangers, unless either such child has express or implied authority to contract therefor, or there is an express or implied promise on the part of the father to pay for the same." 21 Am. & Eng. Enc. 1052; *Poock v. Miller*, 1 Hilt. 108; *Raymond v. Loyl*, 10 Barb. 483; *Manning v. Wells*, 85 Hun, 27; 66 N. Y. St. Repr. 109; 32 N. Y. Supp. 601.

If the child is of tender years, however, the case is different, and if such a parent fail to furnish necessities, a stranger may furnish them and recover of the parent compensation where there has been a palpable omission of duty on the part of a parent in supplying a minor child with necessities. *Van Valkenburgh v. Watson*, 13 Johns. 480; *In re Ryder*, 11 Paige, 185; *Furman v. Van Sise*, 56 N. Y. 435; *Clinton v. Rowlin*, 24 Barb. 634. In many instances there is an implied promise on the part of the father to pay for his child's necessities; thus if a parent sends his infant child to school he is liable for clothes furnished to the child.

Parker v. Tillinghast, 19 Abb. N. C. 190. See also *Goetschins v. Hunt*, 24 N. Y. St. Repr. 717; 5 N. Y. Supp. 307; *affd.* 127 N. Y. 682.

A minor who voluntarily leaves his father's house, carries with him no credit, even for necessities. *Raymond v. Loyl*, 10 Barb. 483; *Johnson v. Gibson*, 4 Ed. Smith 231. It is different, however, if the father leaves the house through fear of violence. *Kimball v. Keyes*, 11 Wend. 33; *Van Valkenburgh v. Watson*, 13 Johns. 480.

If the child be of age there is no presumption of agency, and the father cannot be charged with the son's purchases, unless a distinct promise on his part can be proved. *Crane v. Baudouine*, 55 N. Y. 256. And in all cases the burden of proof is on the person seeking to charge the parent. *Van Valkenburgh v. Watson*, 13 Johns. 480.

Where a father on the death of his wife surrendered his infant child to its grandparents who supported it for 14 years, the estate of the father cannot be held liable for the child's support upon an implied promise to pay. *Matter of De Freest*, 41 Misc. Rep. 535; 85 N. Y. Supp. 74.

Where necessities are furnished to an infant upon the credit of his parent or by contract with the parent or general guardian, no liability is established against the infant although he have a separate estate. One seeking to charge an infant with the value of necessities furnished must affirmatively prove that the obligation to furnish the infant with necessities had not been discharged by his parent or guardian. *Murphy v. Holmes*, 87 App. Div. 366; 84 N. Y. Supp. 806.

EDUCATION OF CHILDREN.

At common law, a parent's duty to educate his children was only a moral duty, an "imperfect obligation," which, if he neglected it, might subject him to resulting inconveniences in later life.

But this obligation has been enforced for a long time in the states of Continental Europe.

The statutes of this state make elementary education compulsory; and a parent is guilty of a misdemeanor if he fail to require his child to attend school between certain specified ages.

Education Law. § 624. Duties of persons in parental relation to children.

Every person in parental relation to a child within the compulsory school ages and in proper physical and mental condition to attend school, shall cause such child to attend upon instruction, as follows:

1. *In cities and school districts having a population of five thousand or above, every child between seven and sixteen years of age as required by section six hundred and twenty-one of this act unless an employment certificate shall have been duly issued to such child under the provisions of the labor law and he is regularly employed thereunder.*

2. *Elsewhere than in a city or school district having a population of five thousand or above, every child between eight and sixteen years of age, unless such child shall have received an employment certificate duly issued under the provisions of the labor law and is regularly employed thereunder in a factory or mercantile establishment, business or telegraph office, restaurant, hotel, apartment house or in the distribution or transmission of merchandise or messages, or unless such child shall have received the school record certificate issued under section six hundred and thirty of this act and is regularly employed elsewhere than in the factory or mercantile establishment, business or telegraph office, restaurant, hotel, apartment house or in the distribution or transmission of merchandise or messages.*

Educational Law. § 625. Penalty for failure to perform parental duty.

A violation of section six hundred and twenty-four shall be a misdemeanor, punishable for the first offense by a fine not exceeding five dollars, or five days' imprisonment, and for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment. Courts of special

session and police magistrates shall, subject to removal as provided in sections fifty-seven and fifty-eight of the code of criminal procedure, have exclusive jurisdiction in the first instance to hear, try and determine charges of violations of this section within their respective jurisdictions.

See also §§ 620, 621, 622, 623. As to employment certificate and contents thereof, see Labor Law, §§ 70-76, 161-167.

“The education of children in a manner suitable to their station and calling is another branch of parental duty, of imperfect obligation generally in the eye of the municipal law, but of very great importance to the welfare of the state.” 2 Kent Com. 195.

“The last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes, it is not easy to imagine or allow that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education and suffers him to grow up like a mere beast, to lead a life useless to others and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point by not constraining a parent to bestow a proper education upon his children. Perhaps they thought it punishment even to leave the parent who neglects the instruction of his family to labor under those griefs and inconveniences which his family so uninstructed will be sure to bring upon him.” 1 Bl. Com. 451.

The obligation of a parent to educate his child as imposed by the laws of Continental Europe and by the earlier laws of our several states, is discussed in 2 Kent Com. 196 et seq.

An orphan placed in a private home by a benevolent institution paying a certain sum per week for his care to persons

who treat him as a member of the family is a resident of the school district where his custodians reside and is entitled to free education. *People ex rel Brooklyn Aid Society v. Hendrickson*, 125 App. Div. 256; 109 N. Y. Supp. 403; *affd.* 196 N. Y. 551.

DISINHERITANCE OF CHILDREN.

A parent's duty to support minor children exists only during his own lifetime. Hence, by the law of this state, following the common law, he may disinherit his children, whether minors or adults.

The civil law, in this as in many other things more humane than the common law, did not allow a parent to disinherit his child except for cause.

But the statutes of this state limit, in certain instances, the amount of property that a man leaving a wife, child, or parent surviving may give by will to religious, charitable and other institutions.

Moreover, the will of a woman is revoked by her subsequent marriage; and a child born after the making of a will is entitled to the share he would have taken had his parent died intestate, unless some other provision for him be made, or the will show an intention to disinherit him.

Decedent Estate Law. § 17. Devise or bequest to certain societies, associations and corporations.

No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more.

Decedent Estate Law. § 18. Devise or bequest to certain corporations.

No person leaving a wife, or child, or parent shall devise

or bequeath to any institution or corporation formed under laws of eighteen hundred and sixty-five, chapter three hundred and sixty-eight; laws of eighteen hundred and seventy-five, chapter two hundred and sixty-seven; laws of eighteen hundred and seventy-five, chapter three hundred and forty-three; or laws of eighteen hundred and eighty-six, chapter two hundred and thirty-six, more than one-fourth of his or her estate after payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator.

Decedent Estate Law. § 19. Devise or bequest to certain benevolent, charitable and scientific corporations.

No person leaving a wife, or child, or parent, shall devise or bequeath to any institution or corporation formed under laws of eighteen hundred and forty-eight, chapter three hundred and nineteen, more than one-half of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid, to the extent of such one-half, and no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator.

Decedent Estate Law. § 20. Devise or bequest to certain bar associations, veterinary associations and fire corporations.

No person leaving a wife, child or parent shall devise or bequeath to any association or corporation formed under laws of eighteen hundred and seventy-three, chapter three hundred and ninety-seven; laws of eighteen hundred and eighty-seven, chapter three hundred and seventeen; laws of eighteen hundred and eighty-seven, chapter three hundred and fifteen, or laws of eighteen hundred and ninety, chapter two hundred and eighty-six, more than one-fourth of his or her estate, after payment of all debts existing

against said estate, and such devise or bequest shall be valid to the extent of such one-fourth only.

Decedent Estate Law. § 26. Child born after making of will.

Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.

Decedent Estate Law. § 35. Revocation by marriage and birth of issue.

If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either ~~in~~ his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

Decedent Estate Law. § 36. Will of unmarried woman.

A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.

"A father may at his death devise all his estate to strangers and leave his children upon the parish; and the public can have no remedy by way of indemnity against the executor.

'I am surprised,' says Lord Alvanley, 'that this should be the law of any country, but I am afraid it is the law of England.'" 2 Kent Com. 203. It is clearly the law of this state.

"The civil law obliges the parent to provide maintenance for his child and if he refuses *judex de ea re cognoscet*. Nay it carries this matter so far that it will not suffer a parent at his death totally to disinherit his child without expressly giving his reason for so doing. * * * Our law has made no provision to prevent the disinheriting of children by will; leaving every man's property in his own disposal upon the principle of liberty in this as well as in every other action; though perhaps it had not been amiss if the parent had been bound to leave them at least a necessary sustenance." 1 Bl. Com. 447-449.

The child has no legal right to inherit from his parent. Schouler's Dom. Rel. § 265; Ex parte Hunt, 5 Cow. 284.

Any exhaustive treatment of the New York statute is beyond the scope of this work, falling under the law of wills. But a few authorities are given indicating the nature and scope of the statute.

Gift to charitable institution.

Where a husband dies leaving a widow surviving, a devise of all his lands in trusts, proceeds to charitable institutions, is in contravention of the Decedent Estate Law and is valid only to the extent of one-half of the estate after payment of debts and the widow's dower. Jones v. Kelly, 170 N. Y. 401.

The Decedent Estate Law, limiting the amount a person leaving a husband, wife, children or parents can leave to a charitable institution, is not intended solely for the benefit of the relatives named in the statute, but for the benefit of such persons as would take the property if the owner died intestate. Matter of Stilson, 85 App. Div. 132; 83 N. Y. Supp. 67.

In determining whether a bequest to charity exceeds the amount

allowed by the Decedent Estate Law, the value of the life estate and other bequests not charitable should be deducted. *Matter of Strang*, 121 App. Div. 112; 105 N. Y. Supp. 566.

In determining whether a testator has given more than one-half of his estate to charity contrary to the Decedent Estate Law, the value of the widow's dower should be deducted from the gross value of the estate unless she has elected to accept a provision in lieu of dower. In the latter case the release of the dower will be held to date back to the testator's death and no deduction for the dower should be made. *Lord v. Lord*, 44 Misc. Rep. 530; 90 N. Y. Supp. 143.

Where the beneficiary of a testamentary trust is empowered to dispose of the property by will, her husband cannot attack the validity of a gift to charitable corporations on the ground that it exceeds more than half of the estate contrary to the Decedent Estate Law. This, because the appointor is not dispensing of her own property but that of the original testatrix. *Farmers' Loan & Trust Co. v. Shaw*, 127 App. Div. 656; 107 N. Y. Supp. 337; 111 N. Y. Supp. 1118.

Rights of after-born children.

The statute entitling children born after the execution of a will to share in the estate if they are not provided for in the will, or mentioned therein, is based not upon the rule of the common law but upon that of the civil law which presumes an oversight on the part of the parent. Hence, if by the terms of the will it is apparent that the testator had in mind the probability that children might be born they are not entitled to share in the estate. *Wormser v. Croce*, 120 App. Div. 287; 104 N. Y. Supp. 1090.

Chapter 22 of the Laws of 1869 which amended section 49 of the Statute of Wills by making it apply to wills of mothers as well as of fathers is retroactive and applies to wills made before its passage if the estate had not already vested by the death of the testator. *Obecny v. Goetz*, 134 App. Div. 166; 118 N. Y. Supp. 832.

Where a testator having two children living did not change his will after the birth of other children, the after-born children take the portion of the estate that they would have taken had the testator died intestate. The grantee of such after-born children is entitled to maintain partition. *Udell v. Stearns*, 125 App. Div. 196; 109 N. Y. Supp. 407.

Where a testator gives all his property to his wife absolutely and provides that in case she dies before him leaving lawful issue surviving, the interest which she would take if living shall go to such issue in equal portions, there is no provision for posthumous children, and hence a child born after the death of the testator is entitled to the portion of the estate which he would have taken had the testator died

intestate. *Stachelberg v. Stachelberg*, 124 App. Div. 232; 108 N. Y. Supp. 645; *affd.* 192 N. Y. 576.

A sole devisee cannot convey lands where a child was born to the testator after he made the will, and the grantee having paid a subsequent mortgage on the lands cannot recover on the theory that the payment was made under a mistake of fact, it being on the contrary a mistake of law. *Belloff v. Dime Savings Bank*, 118 App. Div. 20; 103 N. Y. Supp. 273; *affd.* without opinion, 191 N. Y. 551.

SUPPORT OF PARENTS BY CHILDREN.

At common law a child is under no duty to support his parents; but if they by age or infirmity are likely to become a charge upon the public, the statute requires their children to contribute to their support.

Code Crim. Proc. § 914. Who may be Compelled to Support Poor Relatives.

The father, mother and children, if of sufficient ability, of a poor person who is insane, blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself, must at their own charge, relieve and maintain him in a manner to be approved by the overseers of the poor of the town where he is, or in the city of New York, by the commissioners of public charities. If such poor person be insane, he shall be maintained in the manner prescribed by the insanity law. The father, mother, husband, wife or children of a poor insane person legally committed to and confined in an institution supported in whole or in part by the state, shall be liable, if of sufficient ability, for the support and maintenance of such insane person from the time of his reception in such institution.

Code Crim. Proc. § 917. Contribution.

If it appear that any such relative is unable to wholly maintain the poor person, or to pay for his maintenance if confined in a state institution for the insane, but is able to contribute towards his support, the court, or a judge

thereof, may direct two or more relatives, of different degrees, to maintain him, or to pay for his maintenance in such an institution, if insane, prescribing the proportion which each must contribute for that purpose; and if it appear that the relatives are not of sufficient ability wholly to maintain him, or to pay for his maintenance in such an institution, if insane, but are able to contribute something, the court, or a judge thereof, must direct the sum in proportion to their ability, which they shall pay weekly for that purpose. If it appears that the relatives who are liable for the maintenance of an insane poor person confined in a state institution for the insane are not able to pay the whole amount due for such maintenance from the time of such poor person's admission to such institution, the court or a judge thereof, must direct the sum to be paid for such maintenance in proportion to the ability of the relatives liable therefor.

The practice is detailed in the other sections of the statute.

“The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in turn to be supported by that offspring in case they stand in need of assistance.” 1 Bl. Com. 453.

“A child is under no legal obligation at common law to support his parents even though they are destitute and infirm. There is a strong moral obligation but no such duty is recognized by the law unless as is the case in some jurisdictions the duty is expressly imposed by statute.” Tiffany Dom. Rel. 291.

The liability of a child to support his parents, who are infirm, destitute or aged, is wholly created by statute, and, therefore, the law does not imply a promise from the child to pay for necessities furnished, without his request, to an indigent parent. *Edwards v. Davis*, 16 Johns. 281.

At common law no legal duty rests upon a child to support his indigent parent, and until proceedings to charge him with such support are taken as provided by statute he is not liable therefor. *Herendeen v. Dewitt*, 49 Hun, 53; 17 N. Y. St. Repr. 298; 1 N. Y. Supp. 467. And a son, who requests the superintendents of the poor to take proceedings to have his father committed to an asylum, and promises to pay a certain sum toward his future support, is liable therefor. *Id.*

The statute requiring a grandchild to support his indigent grandparents extends to the case of his indigent maternal grandparents. *Ex parte Hunt*, 5 Cow. 284.

Defendant is not in default of an order of the court requiring him to support his mother at his own house when he has to support her for about a year, and she leaves without any just cause and does not return, he being willing to receive and support her in his family. *Converse v. McArthur*, 17 Barb. 410.

When an order is made requiring the relative of a person to support him, and fixing a sum to be paid weekly, the relative may provide for the support of the pauper, at such place and in such manner as he shall deem proper, provided the place and manner are approved by the overseer, and it is not until he has neglected or refused to do this that he is liable for the sum directed to be paid. *Duel v. Lamb*, 1 T. & C. 66.

So long as an order, made by a court of sessions, directing the relative of a poor person to pay a specified sum periodically to the superintendent of the poor for the support of such poor person, remains unchanged, such relative is liable to pay the sum therein prescribed. If he or she desires to be relieved therefrom application should be made under the above section of the Code for an amendment of the order. *Aldridge v. Walker*, 73 Hun, 281; 57 N. Y. St. Repr. 273; 26 N. Y. Supp. 296.

Such an order is not void because it gives no option to such person

either to support her daughter or to pay the amount provided, and if it is irregular the remedy is by appeal, and the question of its irregularity cannot be properly raised in an action brought to collect the amount directed to be paid by such person. *Id.*

While the determination provided for by this title is denominated an order, it was a final determination of the manner, and in effect a judgment. *Id.*

The common law affords no means of compelling a husband to support his wife otherwise than by making him liable to third persons who have supplied her with necessaries after he has improperly refused so to do, and the statute providing for the compulsory support of indigent relatives does not apply to husband and wife. *People ex rel. Kehlbeck v. Walsh*, 11 Hun, 292.

The wife of a man who is bound by law to support her, and who is abundantly able to do so, cannot be regarded as a pauper. *Norton v. Rhodes*, 18 Barb. 100.

It is the duty of superintendents of the poor to care for paupers. The wife of a man who is abundantly able to provide for her cannot be deemed a poor person. Superintendents of the poor cannot, therefore, maintain an action in their official capacities against a husband for boarding, clothing, and medical aid furnished to his wife as a pauper. *Norton v. Rhodes*, 18 Barb. 100.

The failure of a son to support his mother as required by an order of the court of General Sessions made under section 915 of the Code of Criminal Procedure is a civil, not a criminal contempt, and he may be punished by an imprisonment exceeding 30 days. *People ex rel. Kroncke v. O'Brien*, 39 Misc. Rep. 110; 78 N. Y. Supp. 904.

Contribution.

The statute authorizes the court to require persons equally liable for the support of an indigent parent to contribute toward such support according to their ability, and where one of two persons is unable to contribute his entire proportion of such support, the court is authorized to require him to contribute according to his ability, and to require the other to pay the residue. *Stone v. Burgess*, 47 N. Y. 521; 2 Lans. 439. And an order reciting that the two are of sufficient ability, and directing the proportion each one is to pay, if the proportion is unequal, is, in effect, a determination that the one required to pay the less sum is unable to pay his full proportion, but is able to pay the sum fixed, and such order is valid. *Id.*

CHASTISEMENT OF CHILDREN.

A parent, and one in loco parentis, may moderately chastise

a minor child; "for the benefit of his education," it is said. But if he abuse this power, he becomes liable criminally, though the child cannot maintain a civil action against him for damages.

"The ancient Roman law gave the father a power of life and death over his family; upon this principle that he who gave had also the power of taking away. * * * The power of a parent by our English laws is much more moderate but still sufficient to keep the child in order and obedience. He may lawfully correct his child being under age in a reasonable manner, for this is for the benefit of his education." 1 Bl. Com. 452.

"The law gives to parents and persons standing *in loco parentis* the right of moderate chastisement or restraint over the person of their children or those to whom they occupy the parental relation. In case this power is abused it has been said, the child has no civil remedy against the parent for personal injuries inflicted, so long as the relation of parent and child continues, yet the criminal law will protect the child from gross misuse of the right of correction." 21 Am. & Eng. Enc. 1035.

With the right to control a child goes the right to moderately correct it, which right of correction extends also to those standing *in loco parentis*, such as step-fathers, or guardians, or masters, or school-teachers. 2 Am. & Eng. Enc. 962; 2 Kent Com. 261; People v. Philips, 1 Wheel. Cr. C. 155. But in the case of master and apprentice, the right to chastisement is wholly personal, and the master cannot delegate it to his foreman or to any one whomsoever. People v. Philips, 1 Wheel. Cr. C. 155. As to school-teachers, see Starr v. Litchfield, 40 Barb. 541. But the father cannot chastise a child to excess so as to injure it; and if he use excessive and unnecessary force, he will be liable criminally. And so if the parent permit his child to starve, or to be injured through want of food or clothing, or abandon it so that it perish, he is guilty of a crime. 4 Bl. Com. 182; Furman v. Van Sise, 56 N. Y. 435.

PARENTS' RIGHT TO SERVICES OF CHILD.

A parent, as a recompense for his obligations, has a right to the services of his child. This right is absolute during the child's minority (if the parent fulfill his obligations); and even after the child's majority services rendered by him to his parent are presumed to be gratuitous, in the absence of proof of an express contract to pay.

"It is elementary that a parent has the right to the services and earnings of his minor children while under his care and protection unless such right has been voluntarily relinquished by him. This is based upon the idea of compensation to the parent for the duty of maintenance." 21 Am. & Eng. Enc. 1039.

The rule extends also to others *in loco parentis*, as to grandfathers, adopted parents and stepparents. Id. 1043.

Speaking of the father's right to the services of his child, the court in *Furman v. Van Sise*, 56 N. Y. 435, says: "This is derived from the obligation of law imposed upon him to maintain, educate and protect the child during infancy and earlier youth, and continues until the child is in a condition ~~to provide~~ for its own maintenance. The law has determined that he is so capable upon attaining the age of twenty-one years."

As regards services rendered between parents and children there is no presumption that there is a promise to pay for them. The ordinary rule is that where one person works for another a contract is presumed. This rule does not hold between those in domestic relations. Thus when services are rendered by persons living in the same family, there is a presumption that such services were gratuitous. *Lipe v. Eisenlerd*, 32 N. Y. 229; *Robinson v. Raynor*, 28 N. Y. 494; *Wilcox v. Wilcox*, 48 Barb. 329. Though a child may recover from his father on an express promise to pay wages during minority, the burden to prove the express agreement

is upon the child. He cannot recover in assumpsit. *Conger v. Van Aernum*, 43 Barb. 602; *Moore v. Moore*, 3 Abb. App. Dec. 303; *Shirley v. Bennett*, 6 Lans. 512.

Where an adult son continues to live with his father and renders services, the law does not imply a promise to pay. *Matter of Milligan*, 112 App. Div. 373; 98 N. Y. Supp. 480.

Support and care furnished by a son to his mother are in the absence of an agreement to pay therefor presumed to be gratuitous. *More v. Shepard*, 133 App. Div. 471; 117 N. Y. Supp. 1095.

Services rendered by a stepson to his aged stepmother are presumed to be gratuitous. *Satterly v. Dewick*, 129 App. Div. 701; 114 N. Y. Supp. 354; *affd.* 197 N. Y. 590.

Where a son-in-law performed services for his father-in-law, as did also his daughter, all living in the same family, it was held that the daughter could not recover for her services, nor could the father recover for the support of his daughter or her children, but that the father-in-law was bound to pay for the services of the son-in-law. *Conger v. Van Aernum*, 43 Barb. 602. Where persons of blood relation live together, such as brothers and sisters, parents and children, there is no presumption of liability for board. *Bowen v. Bowen*, 2 Bradf. 336; *Robinson v. Cushman*, 2 Den. 149; *Carpenter v. Weller*, 15 Hun, 134.

A parent is entitled to the earnings of his minor child even when he works for strangers; but the parent may emancipate the child, either expressly or by implication, and in such case the child is entitled to his own earnings.

The marriage of an infant works an emancipation, as in such case the spouse, if a woman, has the right to support by her husband, or, if a male, a right to his wife's services.

Domestic Relations Law. § 72. Payment of wages to minor; when valid.

Where a minor is in the employment of a person other than his parent or guardian, payment to such minor of his wages is valid, unless such parent or guardian notify the employer in writing, within thirty days after the com-

mencement of such service, that such wages are claimed by such parent or guardian, but whenever such notice is given at any time payments to the minor shall not be valid for services rendered thereafter.

A parent may emancipate an infant child and confer upon him a right to labor for himself and receive the earnings. *Stanley v. National Union Bank*, 115 N. Y. 122.

Where the father of a minor, residing with his parents, neglects to serve upon the child's employer a notice that he claims the child's wages, the title to the wages vests in the child, and if the child pays the same to his mother without objection upon the part of his father, the mother has title. *Watson v. Kemp*, 42 App. Div. 372, 59 N. Y. Supp. 142; *affd.* 160 N. Y. 666.

On the marriage of an infant, he is entitled to his earnings as against his father, by reason of his obligation to support his wife. *Cochran v. Cochran*, 196 N. Y. 86.

The law implies an emancipation from parental authority and control when the father compels or consents that his minor child shall go abroad and earn his own livelihood, or neglects to support him. *Lind v. Sullestadt*, 21 Hun, 364.

Where, by the father's consent, an infant served another under the promise of the latter to do well by the infant, it is to be inferred that the infant and not the father is entitled to the compensation. *Burlingame v. Burlingame*, 7 Cow. 92.

The continued absence of the father without supporting or controlling his son is evidence of his consent that the son might labor for his own benefit. *Canovar v. Cooper*, 3 Barb. 115. In this connection see also *McCoy v. Huffman*, 8 Cow. 84; *Shute v. Door*, 5 Wend. 204.

Where the father of an infant has consented that he have his own wages, he may recover for loss thereof by reason of negligence. If he is not emancipated he cannot recover for

loss of wages. *Lieberman v. Third Ave. R. R. Co.*, 25 Misc. Rep. 704; 55 N. Y. Supp. 677.

Where a minor makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his earnings. *Armstrong v. McDonald*, 10 Barb. 300.

One who having a demand against a minor, received from him an order upon his employer for money earned as wages and collected the money thereon, is not liable in an action therefor to the father of the minor unless it appears that the parent gave the required notice to the employer. *Herrick v. Fritcher*, 47 Barb. 589.

The statute was derived from chapter 266 of the Laws of 1850, which provided that "It shall be necessary for the parents or guardian of such minor children, as may be in service, to notify the party employing such minor, within thirty days after the commencement of such service, that said parent or guardian claim the wages of such minor, and in default of such notice payment to such minor shall be valid."

It will be observed that the requirement that the notice be in writing, and that whenever such notice is given at any time payments to the minor shall not be valid for services rendered thereafter, was not in the former law.

Under the former law it was held that the provision requiring notification by the parent or guardian to persons employing minor children, within thirty days after the commencement of the service, only protects the employer if, without notice, he pays the minor after the expiration of thirty days, but does not prevent the parent from collecting any wages due to the infant although the parent may fail to give notice within thirty days, nor does it affect his right to collect the infant's future earnings, after giving notice at any time. *McClurg v. McKercher*, 56 Hun, 305; 30 N. Y. St. Repr. 603; 9 N. Y. Supp. 572. It would thus seem that no change was made in the revision by inserting the clause authorizing the notice to be given at any time.

SEDUCTION: ENTICING AWAY CHILD.

A parent, or one in loco parentis, entitled to the services of a female infant has an action for damages against one who seduces her or entices her away.

In theory the action is based upon the loss of services; but this is now reduced to a mere fiction of the law, as a recovery may be had with punitive damages although the woman be in the service of strangers.

Seduction under promise of marriage is a crime; so too the abduction of a child.

Penal Law. § 2175. Seduction under promise to marry.

A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by the fine of not more than one thousand dollars or both.

Penal Law. § 2176. Bar to prosecution.

The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offense before the finding of an indictment, is a bar to a prosecution for a violation of this section.

Penal Law. § 2177. No conviction on unsupported testimony.

No conviction can be had for an offense specified in the last section, upon the testimony of the female seduced, unsupported by other evidence.

Penal Law. § 70. Abduction.

A person who:

- 1. Takes, receives, employs, harbors or uses, or causes or procures to be taken, received, employed or harbored or used, a female under the age of eighteen years, for the purpose of prostitution; or, not being her husband, for the purpose of sexual intercourse; or, without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage; or,*
- 2. Inveigles or entices an unmarried female, of previous chaste character, into a house of ill-fame or of assignation,*

or elsewhere, for the purpose of prostitution or sexual intercourse; or,

3. *Takes or detains a female unlawfully against her will, with the intent to compel her, by force, menace or duress, to marry him, or to marry any other person, or to be defiled; or,*

4. *Being parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, consents to her taking or detaining by any person for the purpose of prostitution or sexual intercourse;*

Is guilty of abduction and punishable by imprisonment for not more than ten years, or by a fine of not more than one thousand dollars, or by both.

The action for seduction is not thought to be within the scope of this book. The right to maintain the action is merely indicated as one arising out of the relation of parent and child. For detailed treatment of the action, see Fiero on Torts, 298.

An action for seduction cannot be brought by the woman seduced, but only by a person having a right to her services, such as her parents or master. The action is based in theory on the loss of services, though punitive damages are allowed. *Hamilton v. Lomax*, 26 Barb. 615; *Clark v. Fitch*, 2 Wend. 459.

The theory upon which the action is founded has become a mere fiction as the father may sue although the daughter be in the service of the defendant. *Mulvehall v. Millward*, 11 N. Y. 343.

A parent may maintain an action for damages against one who entices away or abducts his child. Fiero on Torts, 290.

As a father has a right to the custody of his child, he has an action against one enticing him away. *Caughuy v. Smith*, 50 Barb. 351. But there must be an enticing away, and the burden is upon the parent to

prove it *Covert v. Gray*, 34 How. Pr. 450; *Rising v. Dodge*, 2 Duer 42; *Stewart v. Simpson*, 1 Wend. 376. And if the son voluntarily leaves his father's house, there can be no action for enticement against one harboring, and in such suit to recover, a father must show that the defendant knew that the child had wrongfully left his father. *Caughy v. Smith*, 47 N. Y. 244.

The action for seduction is in tort and dies with the person. Thus, the representatives of a deceased father or master cannot maintain the action. *George v. Van Horn*, 9 Barb. 523.

A father may maintain an action for seduction of his daughter although she has attained her majority if he be entitled to her services. *Lipe v. Eisenlerd*, 32 N. Y. 229.

The action lies whether the seduction be accomplished by force or by enticement as the theoretical loss of service is the same in both cases. *Lawrence v. Spence*, 99 N. Y. 669.

The consent of the woman seems to be no defense, as the loss of service is the same whether she be virtuous or unchaste. *Fiero on Torts*, 313.

TORTS BY AND AGAINST CHILDREN.

A parent is not liable for the torts of his child except as he may be a joint tortfeasor, or as the child may act as his agent.

When a tort against a child results in loss of services or expense to a parent, he may recover against the wrongdoer; but the child only can sue for the injury to his person or property.

Tort by and against children are beyond the scope of this book. The subject is touched on merely as arising out of the relation of Parent and Child. See *Fiero on Torts*.

In general the parent is not held liable for the torts of his infant children, where he does not assent thereto or ratify them. *Schlossberg v. Lahr*, 60 How. Pr. 450; *Tift v. Tift*, 4 Den. 175. It seems, however, that if the parent counsel and abet the tort, he is liable, or if the tort be committed while the child is acting as his father's agent.

If a minor child be injured, his parent can only recover for loss of services, and the expenses caused by the injury

Cestanos v. Witter, 3 Duer 370; Whitney v. Hitchcock, 4 Den. 461. And he has no remedy for the personal injury to the child, which action is in the child alone, except for action resulting in death, for which there is special statutory provision. On the death of the father, the mother has the action for loss of services, or one standing *in loco parentis* may have such action. Grey v. Durland, 50 Barb. 100; Furman v. Van Sise, 56 N. Y. 435. Even where the parent seeks to recover for assault and battery upon his child, the action is founded upon the theory of loss of services. Cowden v. Wright, 24 Wend. 429.

Where a minor child suffers personal injury the parent may recover for loss of services sustained but he cannot recover for the personal injury to the child. 21 Am. & Eng. Enc. 1044.

A father suing to recover damages for loss occasioned by personal injury to his child, can also recover for the services of his wife in caring for the child as he is entitled to her services. Gorman v. New York, Chicago & St. Louis R. R. Co. 128 App. Div. 414; 113 N. Y. Supp. 219.

A father cannot recover damages for negligence causing injuries to an adult son, or for his loss of time in taking care of him. Ceigler v. Hopper-Morgan Co., 90 App. Div. 379; 85 N. Y. Supp. 656.

PROPERTY OF CHILDREN.

A parent has no rights over his child's property, except as he may be appointed guardian to administer it. (See Guardian and Ward, post, p. 444.)

A parent must support his minor child by his own labor; but if the child have property and the parent be unable to support and educate him, the court in its discretion may allow the income from the child's property, or the principal, to be applied to his maintenance.

"A father has no other power over his son's estate than has his trustee or guardian; for though he may receive the profits during the child's minority yet he must account for them when he comes of age." 1 Bl. Com. 453.

"Apart from his child's earnings a parent as such has

no rights in property acquired by his child." *Tiffany Dom. Rel.* 286.

A parent has no right over his child's property or any right to dispose of it, and the payment to the father by a debtor of the child, will not discharge the debtor. *Jackson v. Cones*, 7 Cow. 36. In order to receive such payment, the father must be more than the natural guardian; he must be the legal guardian, and so a parent can only manage his child's property, when he is appointed guardian for such purpose by the Court. *Jackson v. Cones*, 7 Cow. 36. And if a parent without authority takes possession of his child's property, he will be treated as guardian or trustee, and falls under the same strict rules as to accounting. *Sylvester v. Rallston*, 31 Barb. 286.

"The right of a parent as the natural guardian of his child is limited to a control of the person. He is without authority to collect, discharge or compromise claims due to his child or to contract in regard to his estate. He has a right, however, to the possession of clothing and other necessities furnished to the child by way of maintenance." 21 Am. & Eng. Enc. 1044.

But if a parent give clothing or personal property to a child, they still remain the property of the parent, although the child may possess them. *Prentiss v. Decker*, 49 Barb. 21. Though if there be a special intention that they remain the absolute property of the child, the child's title is good. *Grangiac v. Arden*, 10 Johns. 293.

A step-father who has voluntarily supported step-children cannot charge their own property with the cost of such maintenance. *Sharpe v. Proxy*, 11 Barb. 224; *Williams v. Hutchinson*, 3 N. Y. 312.

The same rule holds where a child is supported by its grandparent and furnished with board and education; in such case the law will not presume a debt against the child's estate. *Walters v. Mayhew*, 30 N. Y. St. Repr. 46; 8 N. Y. Supp. 771.

The Supreme Court has inherent power to protect the property of an infant and will exercise the same even as against the spoliation of the

infant's estate by inferior tribunals. *Matter of Stevens*, 114 App. Div. 607; 99 N. Y. Supp. 1070; *affd.* without opinion, 188 N. Y. 589.

Application of child's estate to his support.

As a parent must educate and maintain minor children, he has no right to reimbursement for such services from the property of his child while his own means are sufficient. *Beardsley v. Hotchkiss*, 96 N. Y. 201; 2 Kent Com. 191. But if the father has not sufficient ability to support the child, and the child has property of his own, the Court may order portions of the child's income to be applied for his support. *In re Kane*, 2 Barb. Ch. 375; *Harring v. Close*, 2 Barb. 594; *Matter of Burke*, 4 Sandf. Ch. 617. The amount of the child's property which will be so applied depends upon the child's fortune and circumstances. The proper procedure in such case is to apply to the court and procure an order applying the infant's property; or if there be no such order, the allowance to the father from the property of his child to reimburse the former for the expense of the child's maintenance will not be made unless there appears to be some special circumstances to justify it. *Beardsley v. Hotchkiss*, 96 N. Y. 201.

The court may order portions of a trust fund which is to be paid to an infant at his majority to be applied to his support and maintenance, if his father has not sufficient financial ability to support him. *Suesens v. Daiker*, 117 App. Div. 668; 102 N. Y. Supp. 919.

It has been held that to entitle a father even to an inquiry as to the propriety of making an allowance for past maintenance, he must show a special case and the extent of the maintenance rendered, and the reasons why they were extraordinary, *Smith v. Goetner*, 40 How. Pr. 185. If there be a special fund to be set apart for the child's maintenance, the father may support him therefrom, even if the father have property. *Freeman v. Coit*, 27 Hun, 447.

In regard to the mother, the rule is more favorable and if the child

have property, it will be charged with maintenance. *Wilkes v. Rogers*, 6 Johns. 566; *Gladding v. Follett*, 2 Duer, 58; 95 N. Y. 652. If the child's estate be small and the income insufficient, the court will in rare cases, allow the capital to be broken into; but rarely so in cases if a claim be made by parent for past maintenance. *Schouler's Domestic Relations*, § 240; *In re Bostwick*, 4 Johns. Ch. 100. And if the child's estate goes to another upon his death, the capital cannot be used. *In re Turner*, 10 Barb. 557.

CONTRACTS BETWEEN PARENT AND CHILD.

The relation of parent and child is a sufficient consideration for a contract between them.

But a contract, or conveyance, beneficial to the parent will be closely scrutinized and must be shown to be fair.

A gift from parent to child will be upheld, in the absence of undue influence.

The relation of parent and child is a sufficient consideration to uphold the transfer of property, the consideration being natural affection, etc., and such transfer is not necessarily void as against creditors. *Seward v. Jackson*, 8 Cow. 406; *Sterry v. Arden*, 12 Johns. 536; *Morris v. Ward*, 36 N. Y. 587.

No pecuniary consideration is necessary to support a conveyance by a father to his children. *Russ v. Maxwell*, 94 App. Div. 107; 87 N. Y. Supp. 1077.

A conveyance between parent and child is closely scrutinized, and it must be shown that the transaction was understood and that there was no fraud, misconduct or undue influence. *Hunter v. McCammon*, 119 App. Div. 326; 104 N. Y. Supp. 402.

"Gifts, conveyances and contracts between parent and child are as valid as if between strangers. But a gift or conveyance from child to parent or a contract beneficial to the parent is presumed to have been made under parental influence and to be voidable by the child if made before or shortly after attaining his majority; and the parent must show that there was no undue influence. Gifts, conveyances

and contracts by a minor child are voidable at his option on the ground of infancy." *Tiffany Dom. Rel.* 287.

Gifts from children to parents when made immediately after the child obtains his majority are regarded with great suspicion, and the parent is required to show that the child acted with full knowledge of his rights, otherwise the gift may be set aside. *Bergen v. Udall*, 31 Barb. 9. If there be a transaction between parent and child soon after the majority of the child without benefit moving to the child, the presumption is that undue influence has been exerted by the parent, and the burden is upon him to show fairness, though the presumption may be rebutted. *Schouler Domestic Relations* § 271. Where the gift is from parent to child there is no such presumption, unless the parent is aged and infirm and is dominated by the child. *Cowee v. Cornell*, 75 N. Y. 591; *Whelen v. Whelen*, 3 Cow. 537.

Speaking of a conveyance made by a daughter to her father shortly after attaining her majority, the court in *Bergen v. Udall*, 31 Barb. 9, says "A transaction like this present * * * will be examined by the court with the most jealous scrutiny and suspicion. The person relying upon it must show affirmatively not only that the person who made it understood its nature and effect and executed it voluntarily but that such will and intention was not in any degree the result of misrepresentation or mistake and was not induced by the exertion, for selfish purposes and for his own exclusive benefit of the influence and control which he possessed as father over his daughter."

Where services are rendered with the hope or expectation of a legacy as compensation, and no legacy is left, no action lies to recover for services; but if there be an express promise that a legacy will be left, and none is left, then an action lies to recover the value of the services.

But the contract must be proved by the most convincing evidence. *Martin v. Wright*, 13 Wend. 460; *Campbell v. Campbell*, 65 Barb. 645; *Shakespear v. Markham*, 10 Hun, 311; *Robinson v. Raynor*, 28 N. Y. 494.

CHAPTER XIV.

BASTARDS.

A bastard is one born out of lawful wedlock. By the common law, a child begotten before marriage was not a bastard, if born during coverture.

By the civil law a bastard became legitimate if the parents afterwards intermarried, and such is the statute of this state. (See post, p. 425.)

But a child born during wedlock, may be a bastard if, in fact, not begotten by the husband, but by an adulterer.

The legitimacy of children is governed by the law of the domicile of the parents.

“A bastard by our English laws is one that is not only begotten but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard if the parents afterwards intermarry; and herein they differ most materially from our laws which though not so strict as to require that the child shall be begotten yet makes it an indispensable condition to make it legitimate that it shall be born after lawful wedlock.” 1 Bl. Com. 454.

And says the commentator, “The reason of our English law is surely much superior to that of the Roman. * * * (1) because of the very great uncertainty there will generally be in the proof that the issue was really begotten by the same man; whereas by conforming the proof to the birth and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child; (2) because by the Roman law a child may continue a bastard or be made legitimate at the option of the father and mother by a marriage *ex post facto* thereby

opening a door to many frauds and partialities which by our law are prevented. Id. 455.

And the commentator, having described other defects in the Roman Law, remarks: "Our constitutions guard against this indecency and at the same time give sufficient allowance to the frailties of human nature." 1 Bl. Com. 455.

A bastard is every one born out of lawful matrimony though the matrimony be afterwards solemnized between the parties, for in such case he is a bastard by the common law though he be a *muelier* by the civil law. Comyn's Digest, Bastard, A.

"So also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor marie* for above nine months so that no access to his wife can be presumed her issue during that period shall be bastards. But generally during the coverture access of the husband shall be presumed unless the contrary can be shown which is such a negative as can only be proved by showing him to be elsewhere." 1 Bl. Com. 457.

"And so it is of all children born so long after the death of the husband that by the usual course of gestation they could not be begotten by him. But this being a matter of some uncertainty, the law is not exact as to a few days." 1 Bl. Com. 456.

Law of domicile governs.

Under the common law the legitimacy or illegitimacy of a person was determined by the law of the country where he was born. If by that law he was legitimate, he was deemed legitimate everywhere, and vice versa. The rule did not hold, however, if the parents were citizens or representatives of a foreign country, passing through the country of

the birth. Haight, J., in *Olmsted v. Olmsted*, 190 N. Y. 458.

PROOF OF ILLEGITIMACY.

The presumption of the legitimacy of a child born during cohabitation, or within nine months of the husband's death, is one of the strongest known to the law.

Though illegitimacy must be shown by the clearest proof, it is, at present, wholly a question of fact.

The legitimacy of children may be made an issue in an action for divorce. (See *ante*, pp. 100, 142.)

"The rule at common law (and which subsisted from the time of the Year Books down to the early part of the last century) declared the issue of every married woman to be legitimate except in the two special cases of the impotency of the husband and of his absence from the realm. But in *Pendrell v. Pendrell*, Str. 925, the absurd doctrine of making legitimacy rest entirely and exclusively on the fact of the husband being *infra quatuor maria* was exploded, and ever since that time the question of the legitimacy or illegitimacy of the child of a married woman has been regarded as a matter of fact resting on decided proof as to the non-access of the husband and it is a question for the jury to determine." 2 Kent Com. 210.

Where access must be presumed, yet evidence may be given of the husband's inability to get children. And where it is found that the husband had no access there is no presumption of legitimacy. Comyn's Digest, Bastard, A.

The presumption of legitimacy is one of the strongest known to the law and is only overthrown by evidence stronger than the presumption. The burden of proof is on the party asserting the illegitimacy. *Mayer v. Davis*, 119 App. Div. 96; 103 N. Y. Supp. 943.

In the absence of proof to the contrary cohabitation of a man and woman in the apparent relation of husband and wife raises a presump-

tion of marriage and of the legitimacy of their children. The illegitimacy of such children must be established by clear and irrefragable proof. But there is no presumption of marriage where the original relation was meretricious in the absence of proof that it subsequently became matrimonial. *Tracy v. Frey*, 95 App. Div. 579; 88 N. Y. Supp. 874.

One seeking to establish the illegitimacy of another must show beyond denial, dispute, or controversy that the mother's husband did not have access. *Mayer v. Davis*, 122 App. Div. 393; 106 N. Y. Supp. 1041.

The sole evidence of the mother, a married woman, shall not be admitted to bastardize her child. *Comyns Digest, Bastard, A.*

Friends, neighbors and relatives of parents of a child may testify as to his legitimacy or illegitimacy. *Tracy v. Frey*, 95 App. Div. 579; 88 N. Y. Supp. 874.

PROPERTY RIGHTS OF BASTARDS: CONTRACTS FOR SUPPORT.

At common law a bastard, being *filius nullius*, had no rights of inheritance from his parents, or from any person. Neither could they inherit from him; his only heirs being those of his own body.

But in this state by statute a mother and her illegitimate children may take from each other by descent or distribution, if the mother die without lawful issue or the bastard die without issue or wife entitled to take. The relatives of the mother also take if she be dead.

Decedent Estate Law. § 89. Illegitimate children.

If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

Decedent Estate Law. § 98. Distribution of personal property of decedent.

If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such

surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

9. *If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.*

15. *If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.*

"The rights (of a bastard) are very few being only such as he can acquire, for he can inherit nothing being looked upon as the son of nobody and sometimes called *filius nullius* and sometimes *filius populi*." 1 Bl. Com. 459.

"A bastard, being in the eyes of the law *nullius filius* * * * has no inheritable blood and is incapable of inheriting as heir either to his putative father or his mother or to any one else, nor can he have heirs but of his own body." 2 Kent Com. 212.

"A bastard may purchase to him and his heirs generally though he can have no heirs but the issue of his body." Comyn's Digest, Bastard, E.

An illegitimate child is not a proper party to an accounting of the administratrix of his father. Matter of Losee, 119 App. Div. 107; 103 N. Y. Supp. 137.

Judge Follett, in *Miller v. Miller*, 18 Hun 507, discusses at length the effect of a statute of the state where the illegitimate child was born and domiciled, legitimatizing the child by a marriage of the parents subsequent to the child's birth. The opinion was, of course, written

when no statute of a similar nature existed in this state. It was held that the right of an illegitimate child to inherit lands in this state was to be determined solely by the laws of this state, and that a legitimization by the laws of another state could not affect this right. In concluding his opinion, Judge Follett says: "Permitting the legitimization of children long after their birth, by the marriage of their parents, would not tend to the establishment of families through that relation. Several states have adopted in whole, or in part, the rule of the civil law. But this state has not, and the legislature of another state cannot thrust it upon us. We think that until the rule is changed by the legislature, the common-law meaning of the word 'illegitimate' must prevail." It is evident, under the present status of our laws, that this case cannot be applied to the right of illegitimate children whose parents have intermarried, to inherit lands in this state.

The mother is entitled to the custody of her bastard as against the father. And while she cannot, except through bastardy proceedings (see post, p. 481), compel the father to provide for it, his contract to do so is enforceable, unless the consideration be unlawful sexual intercourse.

The mother is entitled to the custody of a bastard child, and the father may be compelled by *habeas corpus* to render her possession. If he wrongfully retains possession he is liable to the child as for a false imprisonment. *Robalina v. Armstrong*, 15 Barb. 247; *The King v. Hopkins*, 7 East. 579; *People v. Laudt*, 2 Johns. 375; *People v. Kling*, 6 Barb. 366; *Carpenter v. Whitman*, 15 Johns. 209.

"The mother has no power to compel the putative father to support the child. She has a right to the custody of it as against the putative father, and is bound to maintain it as its natural guardian: though perhaps the putative father might assert a right to the custody of the child as against a stranger." 2 Kent Com. 215.

The mother of an illegitimate child if of means must support it until it becomes of an age to be self-supporting. *Rousseau v. Rouss*, 180 N. Y. 116; revg. 91 App. Div. 230; 86 N. Y. Supp. 497.

A mother who delivers an illegitimate child to the New York Foundling Hospital renounces her parental right and

implies a consent that the institution may indenture the child to other persons. *Matter of Shapiro*, 103 App. Div. 303; 92 N. Y. Supp. 1027.

Assumpsit for the support of a bastard does not lie against the reputed father, though he be charged by an order of filiation with its support, unless upon a promise express or implied. *Moncrief v. Ely*, 19 Wend. 407.

"There are cases in which the courts of equity * * * have decreed a specific performance of a voluntary settlement made by the father in the favor of the mother of his natural child." 2 Kent Com. 216.

An agreement by a putative father to pay a sum of money for the support of his illegitimate child is enforceable although the support is to be furnished by the mother; but an agreement by a man to support a prospective child in consideration of illicit relations with its mother is void as against public morals. *Randolph v. Stokes*, 125 App. Div. 679; 110 N. Y. Supp. 20.

An agreement by the putative father of an illegitimate child to settle a certain sum upon the child in consideration of the mother's promise to support and maintain it for a certain period must be established by the clearest and most convincing proof. The mother of the illegitimate child is prohibited from testifying to such contract as against the estate of the father by section 829 of the Code of Civil Procedure. *Rousseau v. Rouss*, 180 N. Y. 116; revg. 91 App. Div. 230; 86 N. Y. Supp. 497.

There can be no recovery on an agreement by the putative father of an illegitimate child made with the mother to pay a weekly sum for the child's support in consideration of a general release, executed by her, where the mother violated the contract by instituting bastardy proceedings. *Schnurr v. Quinn*, 83 App. Div. 70; 82 N. Y. Supp. 468.

As to the promise of a father to support an illegitimate child, see *Todd v. Weber*, 95 N. Y. 181.

BASTARDY PROCEEDINGS.

The father of a bastard may be compelled to provide for its

support, and for the support of the mother during her confinement and recovery, if there be danger that either of them will become a public charge.

In bastardy proceedings the paternity of the child may be made an issue, and determined.

The mother also, if she have financial ability, may be compelled to support her child.

Code Crim. Proc. § 838. Definition of a bastard.

A bastard is a child who is begotten and born:

- 1. Out of lawful matrimony;*
- 2. While the husband of its mother was separate from her, for a whole year previous to its birth; or,*
- 3. During the separation of its mother from her husband, pursuant to a judgment of a competent court.*

Code Crim. Proc. § 839. Who are liable for its support.

The father and mother of a bastard are liable for its support. In case of their neglect or inability, it must be supported by the county, city or town chargeable therewith under the provisions of the poor law.

Code Crim. Proc. § 840. Inquiry into facts of bastardy.

If a woman be delivered of a bastard, or be pregnant of a child likely to be born such, and which is chargeable to a county, city or town, a superintendent of the poor of the county, or an overseer of the poor or other officer of the almshouse of the town or city where the woman is, must apply to a justice of the peace or police justice in the county to inquire into the facts of the case.

Code Crim. Proc. § 841. Examination by the magistrate and warrant against the father.

The magistrate must, by the examination of the woman on oath, and any other testimony which may be offered, ascertain the father of the bastard, and must issue his warrant, directed to a peace officer of the county, commanding

him, without delay, to apprehend the father, and bring him before the justice, for the purpose of having an adjudication as to the affiliation of the bastard.

Code Crim. Proc. § 850. Determination of the case, and order of the magistrates.

Upon the hearing, the magistrates must determine who is the father of the bastard, and must proceed as follows:

1. If they determine that the defendant is not the father of the bastard, he must be forthwith discharged;

2. If they determine that he is the father, they must make an order of filiation, specifying therein the sum to be paid weekly or otherwise, by the defendant for the support of the bastard; and if the mother be indigent, the sum to be paid by the defendant for her support during her confinement and recovery, and in case said bastard shall die, that the defendant will pay the necessary funeral expenses;

3. They must certify the reasonable costs of arresting the defendant, and of the order of filiation;

4. They must reduce their proceedings to writing, and subscribe them.

Code Crim. Proc. § 851. Defendant to pay the costs, and give undertaking for support of bastard and mother, or for appearance, etc.

If the defendant be adjudged to be the father, he must immediately pay the amount certified for the costs of the arrest and of the order of filiation, and enter into an undertaking, with sufficient sureties approved by the magistrates, to the effect:

1. That he will pay weekly or otherwise, as may have been ordered, the sum directed for the support of the child, and of the mother during her confinement and recovery, or which may be ordered by the county court of the county, and that he will indemnify the county, and town or city where the bastard was or may be born (as the case may be), and every other county, town or city, which may have been or may be put to expense for the sup-

port of the bastard, or of its mother during her confinement and recovery, against those expenses, or that the sureties will do so, not exceeding the sum mentioned in the undertaking, and which must be fixed by the magistrates; or,

2. That he will appear at the next term of the county court of the county, to answer the charge and obey its order thereon, or that the sureties will pay a sum equal to a full indemnity for supporting the bastard and its mother, as provided in the first subdivision of section 844.

Code Crim. Proc. § 856. Magistrates may compel mother to disclose the father of the bastard; proceedings, if she refuse.

In making an examination authorized by this chapter, the magistrate issuing the warrant, or the magistrates making the examination, may compel the mother of a bastard, chargeable to a county, city or town, or a woman pregnant of a child likely to be born such, to disclose the name of the father of the bastard; or if she refuse to do so, may, by a warrant setting forth the cause thereof, at the expiration of one month from her delivery, if sufficiently recovered, commit her to the county jail, or in the city of New York, to the city prison of that city, until she disclose the name of the father.

Code Crim. Proc. § 857. If mother possesses property, two magistrates may make an order that she pay for the support of the child.

If the mother of a bastard, chargeable or likely to become chargeable, as provided in section 840, be possessed of property in her own right, any two magistrates of the county or city where she is, on the application of any of the officers mentioned in that section, must examine into the matter, and may make an order charging the mother with the payment of money weekly, or otherwise, for the support of the bastard.

The practice in Bastardy Proceedings is given in great

detail in the Code of Criminal Procedure, §§ 838 to 886. Only the sections touching upon the substantive law are given, *supra*. Statutes of similar import have existed since 18 Eliz. c. 3.

“The method in which the English law provides for the maintenance of them (bastards) is as follows: When a woman is delivered and declares herself with child of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended and commit him until he give security either to maintain the child or appear at the next quarter sessions to dispute and try the fact. * * * Yet such is the humanity of our laws that no woman can be compulsively questioned concerning the father of her child until one month after her delivery which indulgence is however very frequently a hardship on parishes by giving the parents opportunity to escape.” 1 Bl. Com. 458.

Bastardy proceedings are quasi-criminal, and an order of filiation should not be made except upon testimony, which is entirely satisfactory. *People ex rel. Mendelovitch v. Abraham*’s 96 App. Div. 27; 88 N. Y. Supp. 924.

A foreign judgment in bastardy proceedings is merely in the nature of a police regulation and is not entitled to full credence here. *Matter of Neidnig*, 123 App. Div. 894; 108 N. Y. Supp. 478.

LEGITIMATION BY SUBSEQUENT MARRIAGE OF PARENTS.

At common law illegitimacy was beyond cure, save perhaps, by act of Parliament.

The civil law was more humane, and one born a bastard became a legitimate child on the subsequent marriage of his parents. (See *ante*, p. 415.)

By statute the rule of the civil law now obtains in the State of New York, save that property rights vested before the marriage cannot be divested by the legitimatization of the child.

Domestic Relations Law. § 24. Effect of marriage of parents of illegitimates.

All illegitimate children whose parents have heretofore intermarried or who shall hereafter intermarry shall thereby become legitimized and shall become legitimate for all purposes and entitled to all the rights and privileges of legitimate children; but an estate or interest vested or trust created before the marriage of the parents of such child shall not be divested or affected by reason of such child being legitimized. Nothing in this article shall be deemed or construed to in any manner impair or affect the validity of any lawful marriage contract made before the passage of this article.

“A bastard may lastly be made legitimate and capable of inheriting by the transcendent power of an act of Parliament and not otherwise as was done in the case of John of Gaunts’ bastard children by a statute of Richard the Second.” 1 Bl. Com. 459.

“These unhappy fruits of illicit connection were by the civil and canon laws made capable of being legitimated by the subsequent marriage of their parents; this doctrine of legitimation prevails at this day with different modifications in France, Germany, Holland and Scotland.” 2 Kent Com. 208.

Although a ceremonial marriage was void because the husband concealed the fact that he had a wife living, children born of that marriage before the death of the other wife are made legitimate where the parties cohabited as husband and wife, when the impediment is removed so as to constitute a common-law marriage. *Matter of Schmidt*, 42 Misc. Rep. 463; 87 N. Y. Supp. 428.

The statutes of 1895–1899, legitimatizing illegitimate children of parents who have subsequently married are not retroactive and do not divest vested interests. Thus an illegitimate child born in 1874, whose parents married there-

after, and whose father died in 1875, is not the next of kin of his parental grandmother. Hence where the grandmother's estate had been divided among her legitimate children, the illegitimate grandson cannot compel them to file an inventory of the estate. *Matter of Barringer*, 29 Misc. Rep. 457; 61 N. Y. Supp. 1090.

Where a testator, knowing that his son had an illegitimate child, made a will creating a trust for his son during life, and at his death the capital to be paid to "his lawful issue, then living," the illegitimate child does not take, although the son married the mother of the child to his father's knowledge prior to the will. *United States Trust Co. v. Maxwell*, 26 Misc. Rep. 276; 57 N. Y. Supp. 53.

Legitimation under a foreign law will be recognized here unless the marriage be incestuous, polygamous, or prohibited by law.

Where by virtue of the laws of a foreign state an illegitimate child is made legitimate by the subsequent marriage of its parents in the foreign jurisdiction, the legitimacy is recognized here and the child is entitled to all rights flowing from that status although born in the foreign country. But this rule will not hold where the marriage was polygamous, incestuous or prohibited by law. *Olmsted v. Olmsted*, 190 N. Y. 458.

Not so, however, where the foreign marriage will enable the child to participate in property in this state the title to which has already vested in others. *Olmsted v. Olmsted*, 216 U. S. 386.

Where a resident of this state deserted his wife and going to another state obtained a divorce on service by publication, in which action the wife did not appear so that the divorce was invalid for lack of jurisdiction, illegitimate children of the parent begotten in the other state were not legitimized by his subsequent marriage with their mother. This because the second marriage was polygamous in view of the

invalidity of the divorce. *Olmsted v. Olmsted*, 190 N. Y. 458.

The legitimation of an infant under the laws of a foreign country where the marriage took place, and which was the domicile of the parents, is effective in determining the rights of such infant to inherit property in this State as heir of its father. *Bates v. Virolet*, 33 App. Div. 436; 53 N. Y. Supp. 893.

CHAPTER XV.

ADOPTION OF CHILDREN.

By an adoption in its strict meaning the relation between the child and his foster parents becomes the same as that existing between a child and his natural parents. Each acquires a right of inheritance from the other.

Such adoption was unknown to the common law; but was permitted by the civil law.

But at common law a person could "adopt" the child of another. That is to say he could become the custodian, or guardian of the person of the child by the consent of the parents; but neither gained a right of inheritance.

Although there be no strict adoption, a promise by a foster parent to provide for an adopted child is enforceable, if the child was surrendered to the promisor in reliance thereon.

The adoption of children was unknown to the common law of England, and exists in the states of the Union solely by virtue of statute. *Carroll v. Collins*, 6 App. Div. 106; 74 N. Y. St. Repr. 667, 40 N. Y. Supp. 54.

"The adoption of children and strangers to the blood was known to the Athenians, the Spartans, the Romans and ancient Germans. * * * The provisions of the Roman law as modified by Justinian were transmitted to the modern nations of Europe and appear in the Code Civil of France and in the Spanish law (31 Cent. L. J. 66). This form of domestic relation was however unknown to the common law of England and exists in this country only by virtue of statute. (*Morrison v. Session Estate*, 70 Mich. 297; *Ballard v. Ward*, 89 Pa. St. 358; *Abney v. De Loach*, 84 Ala. 393; *Carroll v. Collins*, 6 App. Div. 106; 74 N. Y. St. Repr. 667; 40 N. Y. Supp. 54.) The first statutory provision in this

state is contained in the laws of 1873, chapter 830." *Matter of Thorne*, 155 N. Y. 140, 143.

Adoption was not recognized at common law and exists in this country only by virtue of the statute. There is no presumption of adoption by the mere fact that minors live with persons whose name they assume. *Matter of Huyck*, 49 Misc. Rep. 391; 99 N. Y. Supp. 502.

A child taken into a family, but not formally adopted is not entitled to share in the proceeds of an insurance policy on the life of her foster parent payable to his heirs. *Merchant v. White*, 77 App. Div. 539; 79 N. Y. Supp. 1.

Where a sole surviving parent transfers the custody of his child to another in consideration of a written promise to adopt her, and to leave her property, as if she were the legitimate offspring of the proposed foster parent, there is a binding contract which inures to the benefit of the child. This is true, although the foster parent did not adopt the child because his wife did not consent. *Middleworth v. Ordway*, 191 N. Y. 404.

Where a woman made a written agreement with plaintiff's mother to maintain plaintiff, who was an infant, as her own child, and at her death give him all her property, if the mother would surrender the custody and control of the child, and where the plaintiff and his mother fulfilled their part of the agreement, it was held that the contract was binding upon the heirs and next of kin of the decedent and that the plaintiff was entitled to a specific performance thereof. *Winnie v. Winnie*, 166 N. Y. 263.

A contract to leave property upon death to an adopted child in consideration of the surrender of the child for adoption, may be enforced, although the contract was made before the enactment of the statute authorizing adoption and conferring heritable qualities upon an adopted child. *Godine v. Kidd*, 64 Hun, 585; 46 N. Y. St. Repr. 813; 19 N. Y. Supp. 335.

A child who has been adopted by husband and wife who, in consideration of the adoption, agree upon their death to give the child all their property, may maintain an action against the devisees and grantees of the husband to compel the specific performance. Nor is a decree of the Surrogate's Court denying the right of such child to intervene on the probate of the husband's will on the ground that there was no valid adoption a bar to the maintenance of such action. *Brantingham v. Huff*, 43 App. Div. 414; 60 N. Y. Supp. 157.

For the purpose of a transfer tax a child may occupy the relation of a child to a person other than her own parents although there be no legal adoption. *Matter of Davis*, 184 N. Y. 299.

An oral promise by a grandfather to adopt his granddaughter and to leave her a specific portion of his estate by will, not followed by any formal adoption, does not entitle the granddaughter to maintain an action for specific performance of the contract and to have conveyances made by the grandfather and his will declared null and void. *Mahaney v. Carr*, 175 N. Y. 454.

The terms of an indenture of adoption imposing certain obligations to an adopted child upon the foster parent cannot be varied or enlarged by evidence of a parol agreement made at or before the execution of the instrument. Thus, it cannot be shown by parol that he agreed to make the child his heir and next of kin and leave her property by will. *Brantingham v. Huff*, 174 N. Y. 53.

A testamentary gift to "children" does not include a nephew who was treated as an adopted child from the time he was eleven years old although never formally adopted where the will in another clause made a provision for him as a nephew. *Hamlin v. Stevens*, 177 N. Y. 39.

Where foster parents on adoption agree that the adopted child on attaining the age of 18 years should be entitled to her "dower" rights in their property, it will be construed to mean that she is entitled to share in her foster parents' estate as a legitimate child would be entitled to share in case of intestacy. Under such agreement, she is not entitled to the enjoyment of her rights on reaching the age of 18 years but her status as a child then begins. Such promise, though unilateral if performed by the person not bound by its terms, will be enforced against the other. The rights of the adopted child however are subordinate to the dower rights of the foster-father's widow. *Middleworth v. Ordway*, 49 Misc. Rep. 74; 98 N. Y. Supp. 10.

The New York Statute, conforming to the civil law, now allows adoption in the stricter sense.

An adult unmarried person, or an adult spouse with the consent of the other spouse, or both together, may adopt a minor by complying with the statute. But certain vested rights existing before the adoption cannot be divested thereby.

The adoption must take place before a county judge or surrogate; and the statute states the persons whose consent is necessary under different circumstances.

Charitable institutions having custody of orphans or destitute children may consent to their adoption.

Domestic Relations Law. § 110. Definitions; effect of article.

Adoption is the legal act whereby an adult takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor. Hereafter, in this article, the person adopting is designated the "foster parent." A voluntary adoption is any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution.

An adult unmarried person, or an adult husband or wife, or an adult husband and his adult wife together, may adopt a minor in pursuance of this article, and a child shall not hereafter be adopted except in pursuance thereof. Proof of the lawful adoption of a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created.

Domestic Relations Law. § 111. Whose consent necessary.

Consent to adoption is necessary as follows:

1. *Of the minor, if over twelve years of age;*
2. *Of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor;*
3. *Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary;*
4. *Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living, or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption.*

Domestic Relations Law. § 112. Requisites of voluntary adoption.

In adoption the following requirements must be followed:

1. *The foster parents or parent, the minor and all the persons whose consent is necessary under the last section, must appear before the county judge or the surrogate of the county where the foster parent or parents reside, and be examined by such judge or surrogate, except as provided by the next subdivision.*
2. *They must present to such judge or surrogate an instrument containing substantially the consents required by this chapter, an agreement on the part of the foster parent or parents to adopt and treat the minor as his, her or their own lawful child, and a statement of the age of the child, as nearly as the same can be ascertained, which statement shall be taken prima facie as true. The instru-*

ment must be signed by the foster parent or parents and by each person whose consent is necessary to the adoption, and severally acknowledged by said persons before such judge or surrogate; but where a parent or person or institution having the legal custody of the minor resides in some other country, state or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution, certified as conveyances are required to be certified to entitle them to record in a county in this state, is equivalent to his or their appearance and execution of such instrument.

Domestic Relations Law. § 113. Order.

If satisfied that the moral and temporal interests of the child will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption, reciting the reasons therefore, and directing that the minor shall thenceforth be regarded and treated in all respects as the child of the foster parent or parents. Such order, and the instrument and consent, if any, mentioned in the last section must be filed and recorded in the office of the county clerk of such county.

Domestic Relations Law. § 115. Adoption from charitable institutions.

An orphan asylum or charitable institution, incorporated for the care of orphan, friendless or destitute children may place children for adoption and the adoption of every such child shall, when practicable, be given to persons of the same religious faith as the parents of such child. The adoption shall be effected by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate name to such instruments, and signed by the foster parent or parents and each per-

son whose consent is necessary to the adoption; and may be signed by the child, if over twelve years of age; all of whom shall appear before the county judge or surrogate of the county where such foster parents reside and be examined, except that such officers need not appear; and such judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where the foster parent resides and the adoption shall take effect from the time of such filing and recording.

The adoption of children was unknown to the common law, and exists in this country only by virtue of statute. The saving clause in the statute of this state providing that nothing therein contained shall prevent the adoption of any child heretofore made according to a method practiced in this state from having the effect of an adoption, refers only to those forms of adoption heretofore existing by special statutory enactment contained in the charters of charitable societies and was not intended to sanction private agreements, executed without authority of law and containing no safeguards as to transmission of property. *Matter of Thorne*, 155 N. Y. 140.

Under the doctrine of comity a child legally adopted in another state will be regarded as though duly adopted under our laws for the purpose of determining the right to take property by will or inheritance. *Matter of Leask*, 197 N. Y. 193.

The surrogate's court cannot review the legality of an adoption made in the county court on the judicial settlement of an administrator's accounts, if the order recites all the jurisdictional facts. *Matter of Ward*, 59 Misc. Rep. 328, 112 N. Y. Supp. 282.

An adoption, within the saving clause of chapter 830 of the

Laws of 1873, as amended by chapter 703, Laws of 1887, is not made out where it appears that the only written evidence of the adoption was an entry in the book kept by a charitable society to the effect that the child was adopted by the testator, even though the testator took her from the society, kept her in his home until her marriage, and treated her in every respect as his daughter, and referred to her in his will as his adopted daughter. *Smith v. Allen*, 161 N. Y. 478.

In the case of *Hill v. Nye*, 17 Hun. 457, it was held that the Act of 1873 had no retrospective effect. In construing section 13 of such act which provides "that nothing herein contained shall prevent proof of the adoption of any child heretofore made, according to any method practiced in this state, from being received in evidence, nor such adoption having the effect of an adoption hereunder," the court held that this section did not provide that an adoption theretofore made shall have the like effect as one made thereunder.

In the case of *Carroll v. Collins*, 6 App. Div. 106; 74 N. Y. St. Repr. 667; 40 N. Y. Supp. 54, it was held that section 13 of the Act of 1873 only applied to prior adoptions which were authorized by some special statute at the time when they were made, and have no application to a method of adoption not authorized by any statute.

The provisions of the Act of 1873 are not applicable to the right of a charitable organization to indenture a child for adoption, without the consent of the mother, when it appears that the mother had abandoned the child, within the meaning of a special act giving such organization that right. *Matter of Larson*, 31 Hun, 539.

Where the order recites necessary facts and is signed by the county judge, the omission to sign the consent, as a witness and to sign the certificate of the adopting parent, the natural parents having given their consent, is immaterial. *People ex rel. Burns v. Bloedel*, 42 N. Y. St. Repr. 453; 16 N. Y. Supp. 837.

The objection that the necessary instrument were executed in the presence of persons other than the judge before whom the adoption proceedings were had, is immaterial, if the judge certified in the order of adoption that the adopted child and the adopting parents appeared before him and that the necessary consents and agreement had been

executed as provided by the statute. *Von Beck v. Thomsen*, 44 App. Div. 373; 60 N. Y. Supp. 1094; *affd.* 167 N. Y. 609.

By a statutory adoption the natural parents lose not only all parental rights, but also the right to take the child's property by descent or distribution.

The child not only retains all rights of inheritance from his natural parents, but acquires a right to inherit from his foster parents, and the latter may inherit from him.

Certain exceptions are made where an adoption is made by a step parent; and remainders limited on a condition that the foster parent die without heirs are not affected.

Domestic Relations Law. § 114. Effect of adoption.

Thereafter the parents of the minor are relieved from all parental duties toward, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. Where a parent who has procured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the stepfather or the stepmother of such child may adopt such child, such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. The child takes the name of the foster parent. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the minor sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the

legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.

A legal adoption divests the natural parents of the relation which they have theretofore sustained toward their child and such change of relation is in no way affected by the death of the foster parents. *Matter of Mac Rae*, 189 N. Y. 142.

While the consent of the natural parents of a legitimate child is necessary to a valid adoption under the statute, when that consent has been once given and the adoption effected, they are no longer parents of the child and their consent is not necessary to a second adoption at the death of the foster parents. *Matter of Mac Rae*, 189 N. Y. 142.

As a right of inheritance is not vested during the life of the ancestor, it may be changed by the legislature and hence, although a child was adopted under chapter 830 of the Laws of 1873, which denied a right of inheritance to adopted children, she is entitled to the right of inheritance conferred by chapter 272 of the Laws of 1896, as amended, by chapter 408 of the Laws of 1897, as against the statutory heirs of her foster parents at the time of her adoption. *Gilman v. Guaranty Trust Co.*, 186 N. Y. 127.

Chapter 703 of the Laws of 1887 which conferred the right of inheritance upon an adopted child is retroactive so as to apply to a child adopted before said amendment, if the foster parent died after the amendment took effect. *Theobald v. Smith*, 103 App. Div. 200; 92 N. Y. Supp. 1019.

A child adopted under the statute by husband and wife, after policies of insurance have been issued upon the life of the husband, payable to the wife, and in case of her death to her children, is entitled, upon the

wife's failure to survive, to share in the proceeds of the policies with the natural children. *Von Beck v. Thomsen*, 44 App. Div. 373; 60 N. Y. Supp. 1094; *affd.* 167 N. Y. 601.

As to the heritable capacity of a child under this section, see *Dodin v. Dodin*, 17 Misc. 35; 40 N. Y. Supp. 748.

See note on the law of succession as affected by the adoption of children, in 29 *Abb. N. C.* 49.

A conveyance or devise to a child or children or conditioned upon the survivorship of a child or children is not deemed to include an adopted child, where the grantor or testator is a stranger to the adoption. Thus, where there is a gift in trust, income to the life beneficiary with remainders over to his surviving children, an adopted child is not entitled to take. A testator is deemed to have used the words "child or children" in reference to natural offspring. *Matter of Leask*, 197 N. Y. 193.

Where a will provides that if the testator's son shall die before the testator's widow, his share shall go to his children, a child adopted by the son after the execution of the will and before the death of the testator does not take on the death of the son before the widow. *Matter of Hopkins*, 102 App. Div. 458; 92 N. Y. Supp. 463.

A transfer tax on a legacy to the son of an adopted daughter should be assessed at the same rate as if the mother had been a natural child of the testator. *Matter of Cook*, 187 N. Y. 253.

The widow of a legally adopted son is the "widow of a son" within the meaning of section 221 of the Transfer Tax Law and a bequest to her exceeding \$10,000 is only subject to a tax of one per cent. *Matter of Duryea*, 128 App. Div. 205; 112 N. Y. Supp. 611.

An adoption may be abrogated by consent of all parties and the child returned to his natural parents if the court be satisfied it will be for the best interests of the child.

Where a child has been adopted from a charitable institution, the adoption may be revoked on a showing that the foster parents misuse or fail to provide for him; or on a showing by the foster parents that the child has deserted them or is ill behaved.

Domestic Relations Law. § 116. Abrogation of voluntary adoption.

A minor may be deprived of the rights of a voluntary adoption by the following proceedings only:

The foster parent, the minor and the persons whose consent would be necessary to an original adoption, must ap-

pear before the county judge or surrogate of the county where the foster parent resides, who shall conduct an examination as for an original adoption. If he is satisfied that the abrogation of the adoption is desired by all parties concerned, and will be for the best interests of the minor, the foster parent, the minor, if over the age of twelve years, and the persons whose consent would have been necessary to an original adoption shall execute an agreement, whereby the foster parent agrees, or whereby the foster parent and minor, if the latter is above the age of twelve years and thereby a necessary party as above required, agree to relinquish the relation of parent and child and all rights acquired by such adoption, and the parents or guardian of the child or the institution having the custody thereof agree to re-assume such relation. The judge or surrogate shall indorse, upon such agreement, his consent to the abrogation of the adoption. The agreement and consent shall be filed and recorded in the office of the county clerk of the county where the foster parent resides, and a copy thereof filed and recorded in the office of the county clerk of the county where the parents or guardian reside, or such institution is located, if they reside, or such institution is located, within this state. From the time of the filing and recording thereof, the adoption shall be abrogated, and the child shall re-assume its original name and the parents or guardian of the child shall re-assume such relation. Such child, however, may be adopted directly from such foster parents by another person in the same manner as from parents, and as if such foster parents were the parents of such child.

Domestic Relations Law. § 117. Application in behalf of child for the abrogation of an adoption from a charitable institution.

A minor who shall have been adopted in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, or any corporation which shall have been a party to the agreement by which such child was adopted, or any person on the behalf of such child, may make an application to the county judge or the surrogate's court of the county in which the foster parent

then resides, for the abrogation of such adoption, on the ground of cruelty, misuse, refusal of necessary provisions out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogate's courts, or clothing, or inability to support, maintain or educate such child, or of any violation of duty on the part of such foster parent toward such child; which application shall be by a petition setting forth the grounds thereof, and verified by the person or by some officer of the corporation making the same. A citation shall thereon be issued by such judge or surrogate, in or out of such court, requiring such foster parent to show cause why the application should not be granted. The provisions of the code of civil procedure relating to the issuing, contents, time and manner of service of citations issued not inconsistent with this chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made before him, on the hearing on such citation, the judge or surrogate shall determine that either of the grounds for such application exists, and that the interests of such child will be promoted by granting the application; and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereof.

After one such petition against a foster parent has been denied, a citation on a subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made.

Domestic Relations Law. § 118. Application by foster parent for the abrogation of such an adoption.

A foster parent who shall have adopted a minor in pur-

suance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, may apply to the county judge or surrogate's court of the county in which such foster parent resides, for the abrogation of such adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill-behavior of such child, which application shall be by petition stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the corporation which was a party to such adoption, or, if such corporation does not then exist, to the superintendent of the poor of such county, requiring them to show cause why such petition should not be granted. Unless such corporation shall appear on the return of such citation, before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceeding, and the foster parent shall pay to such special guardian such sum as the court shall direct for the purpose of paying the fees and the necessary disbursements in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has violated his duty toward such foster parent, and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child which any court or officer shall then be authorized to make of vagrant, truant or disorderly children. If such judge or surrogate shall otherwise determine, an order shall be made and entered denying the petition.

Although a County Court and Surrogate's Court have concurrent jurisdiction in adoption under the statute, the power to abrogate the adoption rests solely with that court which

granted the order. Where the surrogate decided that the foster parents are unfit parents and abrogates the adoption, and no appeal is taken from such order, the County Court has no power subsequently to make an order giving the child to the same foster parents. *Matter of Trimm*, 30 Misc. Rep. 493; 63 N. Y. Supp. 952.

CHAPTER XVI.

GUARDIAN AND WARD.

The law governing the relation of Guardian and Ward has been for the most part reduced to a statutory form in the State of New York. There is so much, seemingly needless, repetition in the provisions of the statute that it is difficult to reduce the subject to a logical and coherent form. The powers and duties of the various kinds of guardians are dealt with separately and minutely, as if there were some essential difference in their powers and duties in the several cases. It is thought, however, that whatever differences there may be arise wholly from the manner of the guardian's appointment, and depend also upon whether he be guardian of the person, or of the property, or of both. A guardian is a guardian however he may attain his office, and as respects the care of the ward's person or property, the duties of different kinds of guardians do not seem to differ materially. All guardians must account (under different sections of the code), all may be removed (likewise under different sections); but there are differences in the manner of appointment, tenure of office, and duty to give security.

GUARDIANS IN SOCAGE.

Guardianship may be either of the person, of the property, or of both person and property, as will appear in subsequent treatment of the subject.

Parents, by the law of nature, are the natural guardians of the person of their children; though this right must yield to the

welfare of the child. (See Parent and Child, ante, p. 375.)

Parents are not, however, guardians of the property of their children. To administer such property they must be appointed guardian by the court, save in the single instance of a guardian in socage, an ancient feudal guardianship, not well understood at present, and appertaining only to the care of real property.

A guardian in socage at common law must be a relative by blood who cannot possibly inherit from the ward; but the statute does not recognize this requirement.

Domestic Relations Law. § 80. Guardians in socage.

Where a minor for whom a general guardian of the property has not been appointed shall acquire real property, the guardianship of his property with the rights, powers and duties of a guardian in socage belongs:

1. *To the father;*
2. *If there be no father, to the mother;*
3. *If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred.*

The rights and authority of every such guardian shall be superseded by a testamentary or other guardian appointed in pursuance of this article.

“Of the several species of guardian the first are guardians by nature, viz, the father and in some cases the mother of the child. * * * There are also guardians for nurture which are of course the father or mother, until the infant attains the age of 14 years. * * * Next are guardians in socage who are also called guardians by the common law. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin to whom the inheritance cannot possibly descend. * * * For the law judges it improper to trust the person of an infant in his hands who may by possibility become heir to him, that there may be no temptation or even suspi-

cion of temptation for him to abuse his trust." 1 Bl. Com. 461.

These guardians in socage like those for nurture continue only until the minor is fourteen years of age for then in both cases he is presumed to have discretion so far as to chose his own guardian. 1 Bl. Com. 462; *Byrne v. Van Horsen*, 5 Johns. 66.

The common law guardian in socage can hardly be said to exist in this country, for the guardian must be some relative by blood, who cannot possibly inherit, and such a case can rarely exist. 3 Wait's Actions and Defenses, 533. Whenever it has been recognized, as in the above section, it has been in a form materially differing from its character at common law. In the case of *Fonda v. Van Horne*, 15 Wend. 631, it was said that the Revised Statutes modified the rule that a father could not be guardian in socage to his child as the inheritance may descend to him.

The duties of a guardian in socage relate solely to the care, custody and protection of real property. *Foley v. Mutual Life Ins. Co.*, 64 Hun, 63; 45 N. Y. St. Repr. 918; 18 N. Y. Supp. 615; *affd.* 138 N. Y. 333.

Powers of guardians in socage.

A guardian in socage may lease the lands of his ward for a term as long as he continues guardian. *Emerson v. Spicer*, 55 Barb. 428, *affirmed* 46 N. Y. 594; *Gallagher v. Davis Stevenson Brewing Co.*, 13 Misc. Rep. 40; 68 St. Repr. 164; 34 N. Y. Supp. 94. He can maintain actions for injuries to the real and personal estate of his ward. *Torry v. Black*, 58 N. Y. 185; *Jackson v. De Walts*, 7 Johns 157. He may maintain an action in ejectment respecting the real property of the minor. *Holmes v. Seeley*, 17 Wend. 75.

Where an owner of land dies leaving a widow and infant heirs, the widow is authorized to take the rents and profits of the land for the benefit of the heirs; and any action for use and occupation, or injury to the possession must be brought by her as guardian in socage. *Sylvester v. Ralston*, 31 Barb. 286; *Seaton v. Davis*, 1 T. & C. 91; *Koke v. Balken*, 73 Hun, 145; 57 N. Y. St. Repr. 14; 25 N. Y. Supp. 1038; *affd.* 148 N. Y. 732.

A savings bank is not protected in paying money to the father of

an infant who is not her general or testamentary guardian, even though he produces the bank-book at the time of payment. *Fricken v. Emigrants Industrial Savings Bank*, 33 Misc. Rep. 92; 67 N. Y. Supp. 143.

The mother of infants, who is their guardian in socage, may, for the protection of their common interests, or for her own protection alone, purchase upon foreclosure real estate in which they have interests, and in which she has dower rights, and may take a deed therefor in her own name, and convey a good title to subsequent grantee. *Boyer v. East*, 161 N. Y. 580.

GUARDIANSHIP OF CHARITABLE INSTITUTIONS.

The statute permits a guardianship of the person of indigent children to be conferred on charitable institutions by an instrument in writing signed by their parents, guardians, or by certain municipal and judicial officers.

Domestic Relations Law. § 86. Guardianship of indigent children by incorporated orphan asylums.

The guardianship of the person and the custody of an indigent child may be committed to an incorporated orphan asylum or other institution incorporated for the care of orphan, friendless or destitute children, by an instrument in writing signed:

1. *By the parents of such child, if both such parents shall then be living, or by the surviving parent, if either parent of such child be dead;*
2. *If either one of such parents shall have for a period of six months then next preceding abandoned such child, by the other of such parents;*
3. *If the father of such child shall have neglected to provide for his family during the six months next preceding, or if such child is a bastard, by the mother of such child;*
4. *If both parents of such child are dead, by the guardian of the person of such child lawfully appointed, with the approval of the court or officer which appointed such guardian to be entered of record;*
5. *If both parents of such child are dead, and no legal guardian of the person of such child has been appointed,*

and no such guardian has been appointed by will or by deed by either parent thereof, or if the parents have abandoned such child for the period of six months, then next preceding, by the mayor of the city or by the county judge of the county in which such asylum or such other institution is located.

Such instrument shall be upon such terms, for such time and subject to such conditions as may be agreed upon by the parties thereto. It may also provide for the absolute surrender of such child to such corporation. But no such corporation shall draw or receive money from public funds for the support of any such child committed under the provisions of this section, unless it shall have been determined by a court of competent jurisdiction that such child has no relative, parent or guardian living, or that such relative, parent or guardian, if living, is destitute and actually unable to provide for the support of such child.

Domestic Relations Law. § 87. Record of children to be kept by orphan asylums.

All institutions, public or private, incorporated or not incorporated, for the reception of minors, whether as orphans, or as pauper, indigent, destitute, vagrant, disorderly or delinquent persons, are hereby required to provide and keep a record, in which shall be entered the date of reception, and the names and places of birth and residence, as nearly as the same can reasonably be ascertained, of all children admitted in such institutions, and how and by whom and for what cause such children shall be placed therein, and the names, residence, birthplace and religious denomination of the parents of such children so admitted, as nearly as the same can be reasonably ascertained; and whenever any such child shall leave such institution, the proper entry shall be made in such record, showing in what manner such child shall have been disposed of, and if apprenticed to or adopted by any person or family, or otherwise placed out at service or on trial, the name and place of residence of the person or head of the family to

or with whom such child shall have been so apprenticed, adopted or otherwise placed out. The supreme court may, upon application by a parent, relative or legal guardian of such child, after due notice to the institution and hearing had thereon, by order direct the officers of such institution to furnish such parent, relative or legal guardian with such extracts from such record relating to such child as such court may deem proper. Nothing in this section shall be construed to prevent visitation by relatives and friends in accordance with the established rules of such institutions.

Domestic Relations Law. § 88. Care and custody of poor children in institutions.

The parent of a poor child, committed to an asylum or other institution by a county superintendent, overseer of the poor, board of charities or other officer, shall not be entitled to the custody thereof, except in pursuance of a judgment or order of a court or judicial officer of competent jurisdiction, adjudging or determining that the interests of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in such asylum or institution.

GUARDIANS APPOINTED BY WILL OR DEED.

- A married woman is joint guardian of the person of her children with her husband.**
- A surviving parent may appoint a guardian of the person and property by will or deed, but the guardian cannot act until the will be probated or the deed be recorded.**
- One parent cannot make such appointment during the lifetime of the other, except that either may appoint the other by will.**

Domestic Relations Law. § 81. Appointment of guardians by parent.

A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in

regard to them. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority or for any less time, to any person or persons. Either the father or mother may in the lifetime of them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority. A person appointed guardian in pursuance of this section shall not exercise the power or authority thereof unless such will is admitted to probate, or such deed executed and recorded as provided by section twenty-eight hundred and fifty-one of the code of civil procedure.

Domestic Relations Law. § 82. Powers and duties of such guardians.

Every such disposition, from the time it takes effect, shall vest in the person to whom made, if he accepts the appointment, all the rights and powers, and subject him to all the duties and obligations of a guardian of such minor, and shall be valid and effectual against every other person claiming the custody and tuition of such minor, as guardian in socage or otherwise. He may take the custody and charge of the tuition of such minor, and may maintain all proper actions for the wrongful taking or detention of the minor, and shall recover damages in such actions for the benefit of his ward. He shall also take the custody and management of the personal estate of such minor and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian in socage might by law.

Code Civ. Proc. § 2851. Will or deed to be proved and recorded.

A person shall not exercise, within the State, any power

or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the State, and dying after this chapter takes effect, unless the will has been duly admitted to probate, and recorded in the proper surrogate's court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the State, executed after this chapter takes effect, unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded, within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment; and if a guardian is afterwards duly appointed by a surrogate's court, the presumption is conclusive.

The power to appoint a guardian by will or deed is statutory. *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580. *Matter of Burdick*, 47 Misc. Rep. 28; 95 N. Y. Supp. 206.

A married woman is joint guardian of her children with her husband and the appointment of a testamentary guardian by one of the parents is void, if the other parent survive. *Matter of Kellogg*, 187 N. Y. 355.

An appointment by will, without words indicating the duration of the guardianship, is not void for uncertainty, but the guardianship will continue during the minority. Such an appointment prevents another appointment on the infant's petition after attaining the age of fourteen. *Matter of Reynolds*, 11 Hun, 41.

Although the father of an infant cannot appoint a testa-

mentary guardian of the person and property of his children where the wife survives, he may nevertheless appoint a person to hold and pay over to them a portion of his estate during their minority, for irrespective of the Domestic Relations Law he could have created a power in trust with the same result. *Matter of Kellogg*, 187 N. Y. 355.

The act of a father in disposing of the custody and tuition of his minor children, by deed or will, is not defeated by a surrogate's appointment. *People ex rel. Brooklyn Industrial School v. Kearney*, 31 Barb. 430; 19 How. Pr. 493.

The invalidity of a testamentary provision appointing a guardian while the other parent is living does not prevent the probate of the will. *Matter of Walker*, 54 Misc. Rep. 177; 105 N. Y. Supp. 890.

Section 81 of the Domestic Relations Law making a married woman joint guardian of her children with her husband does not authorize a wife who survives her husband to receive payment of the distributive share of a child. She is not a guardian within the meaning of section 2746 of the Code of Civil Procedure. *Matter of Schuler*, 46 Misc. Rep. 373; 94 N. Y. Supp. 1063.

Under the Act of 1893, the father has no power to appoint the mother as testamentary guardian of his children. *Matter of Alexandre*, 70 N. Y. St. Repr. 431; 35 N. Y. Supp. 658. Under this section only the surviving parent is authorized to appoint such a guardian. The father, having no power under the statute to make the appointment, his void act in attempting to do so cannot be validated by the subsequent assent of the mother. *Matter of Schmidt*, 77 Hun, 201; 59 N. Y. St. Repr. 772; 28 N. Y. Supp. 350, citing *People v. Boice*, 39 Barb. 307. The right of testamentary appointment is not vested jointly in both parents, but in the survivor. *Matter of Howard*, 5 Misc. Rep. 293; 25 N. Y. Supp. 832.

The power of disposing of the custody and tuition, includes guardianship of the infant's estate. *Matter of Zwickert*, 5 Misc. Rep. 272; 26 N. Y. Supp. 773.

Only the surviving parent may appoint a testamentary guardian except that each in the lifetime of both may appoint the other as guardian. A testamentary guardian named by a divorced wife to whom the custody of the children was awarded, is not entitled to letters if the father of the children be living. *Matter of Waring*, 46 Misc. Rep. 222; 94 N. Y. Supp. 82.

A testator cannot appoint a different person as guardian of the person and of the estate of his children. The surrogate may vest guardianship of the person and estate in different persons, but there is no power to do so in the surviving parent. *Matter of Burdick*, 47 Misc. Rep. 28; 95 N. Y. Supp. 206.

The testator's will appointed his wife as guardian of the persons of their children; it was held that she was the testamentary guardian, and, as such, entitled to the custody of their persons, and to the custody and management of their personal estate, and to receive the rents and profits of their real estate. *Gelston v. Shields*, 16 Hun, 143.

The position of a guardian appointed by will is analogous to that of an executor, while the position of a guardian appointed by the court (see post, p. 460) is like that of an administrator.

Objections to the appointment of the testamentary guardian may be taken before the surrogate, on the same grounds as objection may be taken to the issuance of letters to an executor; and while a guardian appointed by will or deed (like an executor) need not give a bond, the surrogate may compel him to do so on a proper showing.

So too he may be removed from office for cause. (See post, p. 492.)

Code of Civ. Proc. § 2852. Qualification and letters of testamentary guardians.

Where a will, containing the appointment of a guardian, is admitted to probate, the person appointed guardian must, within thirty days thereafter, qualify as prescribed in section 2594 of this act; otherwise he is deemed to have renounced the appointment. But the surrogate may extend the time so to qualify, upon good cause shown, for

not more than three months. And any person interested in the estate may, before letters of guardianship are issued, file an affidavit, setting forth, with respect to the guardian so appointed, any fact which is made by law an objection to the issuing of letters testamentary to an executor. Section 2636 to 2638 of this act, both inclusive, apply to such an affidavit, and to the proceedings thereupon. A person appointed guardian by will may, at any time before he qualifies, renounce the appointment by a written instrument, under his hand, filed in the surrogate's office.

Code Civ. Proc. § 2853. When security required from guardian appointed by will or deed.

Where a guardian of an infant's person or property has been appointed by will or by deed, the infant, or any relative or other person in his behalf, may present, to the surrogate's court in which the will was admitted to probate; or to the surrogate's court of the county in which the deed was recorded; a written petition, duly verified, setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting the guardian, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give a bond, in order to entitle himself to letters; and praying for a decree, requiring the guardian to give security for the performance of his trust; and that he may be cited to show cause why such a decree should not be made. Upon the presentation of such a petition, and proof of the facts therein alleged, to the satisfaction of the surrogate, he must issue a citation accordingly. Upon the return of the citation, a decree requiring the guardian to give security may be made, in the discretion of the surrogate, in a case where a person so named as executor, can entitle himself to letters testamentary only by giving a bond; but not otherwise.

Code Civ. Proc. § 2854. What security to be given.

The security to be given, as prescribed in the last two sections, must be a bond to the same effect, and in the same form, as the bond of a general guardian, appointed by the surrogate's court. Each provision of this chapter, applicable to the bond of such a guardian, and to the rights, duties and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, applies to the bond so given, and the parties thereto.

The right of a testamentary guardian to the custody of a ward is not greater than that of the father who appointed him, and where the court is satisfied that the best interests of the child will be promoted by continuing it, for the time being, in the custody of the person to whom it was committed by its mother, the consideration of the child's welfare will prevail, and the custody of the child will not be interfered with upon *habeas corpus*. *People ex rel. Pruyne v. Walts*, 122 N. Y. 238. See also *Matter of Wentz*, 9 Misc. Rep. 240; 61 N. Y. St. Repr. 303; 30 N. Y. Supp. 211.

If the appointment of a testamentary guardian is, by the terms of the will, to take effect upon the happening of any contingency, he must qualify within the time prescribed by the section, or he will lose all right under the will to letters of testamentary guardianship. *Matter of Constantine*, 22 N. Y. St. Repr. 883; 5 N. Y. Supp. 554; 16 Civ. Proc. Rep. 262.

Where the will of a surviving parent nominates as guardian of minor children, persons who are not residents of the state, and who have no office for the transaction of business therein, and who are alleged to be unable to furnish adequate security, the surrogate is not authorized to refuse letters of guardianship. If the bond tendered by the guardian is too small the surrogate should prescribe the amount and kind

of bond to be given. Matter of Welsh, 50 App. Div. 189, 63 N. Y. Supp. 737.

A guardian appointed by will or deed may be compelled to render intermediate and final accountings, in the same manner as other guardians. (As to accountings see post, p. 498.)

Code Civ. Proc. § 2855. Inventory and intermediate account may be required.

Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court having jurisdiction to require security, as prescribed in the last three sections, may, at any time, in the discretion of the surrogate, make an order, requiring a guardian, appointed by will or by deed, to render and file an inventory and account, in the same form, and verified in the same manner as the inventory and account, required to be filed annually by a guardian appointed by a surrogate's court, as prescribed in article second of this title. The order may also require such an inventory and account to be filed, in the month of January of each year thereafter. Sections twenty-eight hundred and forty-two to twenty-eight hundred and forty-five of this act, both inclusive, apply to such an inventory and account, and to the filing thereof, as if the guardian had been appointed by the surrogate's court. The provisions of section twenty-eight hundred and forty-six of this act shall apply to a guardian appointed by will or deed with the same effect as if such guardian had been mentioned in said section, and the proceedings therein prescribed may be had in the case of any such guardian in the same manner as if he were a general guardian.

For sections 2842-2845 of the Code, see post. p. 498, and for section 2846, see post. p. 483.

Code Civ. Proc. § 2856. When surrogate may compel judicial settlement of accounts.

The surrogate's court, having jurisdiction to require

security may compel a judicial settlement of the account of a guardian appointed by will or by deed, in any case where it may compel a judicial settlement of the account of a general guardian; and the proceedings to procure such a settlement are the same as if the guardian so appointed by will or deed had been a general guardian. A guardian appointed by will or by deed may present to the surrogate's court a written petition, duly verified, praying for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case where a petition for a judicial settlement of his account may be presented by any other person as prescribed in this article. The petition must pray that the person who might have so presented a petition may be cited to attend the settlement. Upon the presentation of such petition the surrogate must issue a citation accordingly. Sections twenty-seven hundred and thirty-three to twenty-seven hundred and thirty-seven, both inclusive, and sections twenty-seven hundred and forty-one and twenty-seven hundred and forty-four of this act apply to a guardian accounting as prescribed in this article, and regulate the proceedings upon such an accounting. A guardian designated in this title is entitled to the same compensation as a general guardian.

Code Civ. Proc. § 2857. Effect of decree.

A decree made upon a judicial settlement of the account of a guardian appointed by will or by deed, as prescribed in this article, or the judgment rendered upon appeal from such decree, has the same force, as a judgment of the Supreme Court to the same effect.

GUARDIANS APPOINTED BY COURT.

The inherent jurisdiction over infants and their estates was in the Court of Chancery, and on the abolition of that court vested in the Supreme Court where it still resides.

But the Surrogate's Court has a subsidiary and concurrent jurisdiction, created and wholly measured by the statute.

Code Civ. Proc. § 217. General jurisdiction of supreme court.

The general jurisdiction in law and equity, which the supreme court of the State possesses, under the provisions of the constitution, includes all the jurisdiction, which was possessed and exercised by the supreme court of the colony of New York, at any time, and by the court of chancery in England, on the 4th day of July, 1776; with the exceptions, additions, and limitations, created and imposed by the constitution and laws of the State. Subject to those exceptions and limitations, the supreme court of the State has all the powers and authority of each of those courts, and exercises the same in like manner.

Code Civ. Proc. § 2472. General jurisdiction of surrogate's court.

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

* * * * *

7. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; and, in the cases specially prescribed by law, to direct and control their conduct, and settle their accounts.

8. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

This jurisdiction must be exercised in the cases and in the manner, prescribed by statute.

Code Civ. Proc. § 2821. Power of court to appoint guardians.

The surrogate's court has the like power and authority

to appoint a general guardian, of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, eighteen hundred and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian, of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act. The same person may be appointed guardian of an infant in both capacities; or the guardianship of the person and of the property may be committed to different persons.

“Upon the abolition of the court of awards the care which the Crown was bound to take as guardian of its infant tenants was totally extinguished in every foedal view but resulted to the King in his court of chancery together with the general protection of all other infants in the Kingdom. When therefore a fatherless child has no guardian the court of chancery has a right to appoint one.”
3 Bl. Com. 426.

The Supreme Court has general jurisdiction over guardians. *Strubbe v. Kings County Trust Co.*, 60 App. Div. 548; 69 N. Y. Supp. 1092; *affd.* 169 N. Y. 603.

The Supreme Court possesses all the powers of the late court of chancery and thus a controlling and superintending power over all guardians. It will take an infant from the guardian and deliver it to another whenever the welfare and interest of the infant require it. The Supreme Court has jurisdiction over testamentary guardians and guardians appointed by the surrogate as much as over guardians appointed by the court itself. *People v. Willcox*, 22 Barb. 178.

The jurisdiction of the Supreme Court over infants and

their estates is not limited by the Code, which confers jurisdiction upon the Surrogate's Court, nor by Court Rule 52, which designates the persons who may present a petition for the appointment of a general guardian. Therefore, the Supreme Court has power to reappoint a former temporary guardian of the estate of an infant, although the father of the infant has already been appointed general guardian, and although the infant, being over fourteen years of age, asserts that he will not consent to the appointment of any other person than his father. *Matter of White*, 40 App. Div. 165; 57 N. Y. Supp. 862; *affd.* 160 N. Y. 685.

A surrogate has no general jurisdiction over a guardian, but simply such as has been especially conferred by statute, together with the incidental powers necessary to carry out that jurisdiction. *Matter of Camp*, 126 N. Y. 377.

The Surrogate's Court has only such authority over infants and their property, and over the conduct of their guardians, as is specially conferred by statute. It has no authority, therefore, to direct the conversion of an infant's property from personalty into realty so as to bind an infant upon his attaining majority. *Matter of Bolton*, 159 N. Y. 129.

A guardian appointed by the court is called a general guardian; but there is no vital difference between the obligations of a general guardian, and those of other guardians, save in the matter of giving security. (See ante, p. 453.)

If the infant be fourteen years of age, he himself may petition for the appointment of a guardian, and must nominate his guardian, "subject to the approval of the surrogate." But if the infant do not petition the surrogate may proceed, upon proper notice, to appoint a guardian.

If the infant be under fourteen years of age, any person may petition, in his behalf, for the appointment of a "temporary" guardian, to serve until the infant attains that age, or until a successor be appointed.

The same person may be appointed guardian of both the person and the property, or the guardianship of the person and the property may be committed to different persons.

Code Civ. Proc. § 2822. Petition for appointment, by infant over fourteen.

In either of the following cases, an infant of the age of fourteen years or upwards, may present, to the surrogate's court of the county in which he resides; or, if he is not a resident of the state, to the surrogate's court of the county in which any of his property, real or personal, is situated; a written petition, duly verified, setting forth the facts upon which the jurisdiction of the court depends, and praying for a decree appointing a general guardian, either of his person, or of his property, or both, as the case requires; and, if necessary, that the persons, entitled by law to be cited upon such an application, may be cited to show cause, why such a decree should not be made:

1. *Where such a general guardian has not been duly appointed, either by a court of competent jurisdiction of the state, or by the will or deed of his father or mother, admitted to probate or authenticated, and recorded, as prescribed in section twenty-eight hundred and fifty-one of this act.*

2. *Where a general guardian so appointed has died, become incompetent or disqualified; or refuses to act; or has been removed; or where his term of office has expired. Where the petitioner is a non-resident married woman, and the petition relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence. Where an infant in one of the cases mentioned in this section has refused, or for ten days has failed, to present the petition, the surrogate, upon notice to be given in such manner as he shall direct, to the infant and the persons who would be entitled by law to be cited upon the application of the infant, shall proceed to the appointment of a general guardian of the property of*

the infant in the same manner as if the infant had duly presented the petition.

Code Civ. Proc. § 2826. Guardian to be nominated by infant.

A guardian, appointed upon the application of an infant of the age of fourteen years, or upwards, as prescribed in this article, must be nominated by the infant, subject to the approval of the surrogate.

Code Civ. Proc. § 2827. Appointment of temporary guardian for infant under fourteen.

A relative of an infant under fourteen years of age, or any other person in behalf of such an infant, may present, to the surrogate's court of the county in which the infant resides; or, if he is not a resident of the State, to the surrogate's court of the county in which any of the infant's property, real or personal, is situated; a written petition, duly verified, setting forth the facts, upon which the jurisdiction of the court depends, and praying for a decree appointing a guardian of the person, or of the property, or both, of the infant, to serve until the infant attains the age of fourteen years, and a successor to the guardian is appointed. The cases in which such a guardian may be appointed, the contents of the petition, and the proceedings thereupon, are the same, as prescribed in the foregoing sections of this article, with respect to the appointment of a general guardian, upon the petition of an infant of the age of fourteen years or upwards; except that the surrogate must nominate, as well as appoint, the temporary guardian.

Code Civ. Proc. § 2828. Term of office of temporary guardian.

The term of office of a guardian, appointed as prescribed in the last section, expires when the infant attains the age of fourteen years. But after the infant attains that age, the person so appointed continues to retain all the powers

and authority, and is subject to all the duties and liabilities of a guardian of the person, or of the property, or both, pursuant to his letters; until his successor is appointed and has qualified, or until his letters are revoked, for some other cause, by a decree of the surrogate's court; and his sureties are responsible accordingly.

Code Civ. Proc. § 2831 (in part).

** * * The same person may be appointed guardian of an infant in both capacities; or the guardianship of the person and of the property may be committed to different persons.*

The statute does not authorize an infant of over fourteen to emancipate himself from parental control. The infant has no absolute right to the appointment of a guardian upon his own nomination. The surrogate has a discretion to determine whether the interests of the infant will be promoted by the appointment of any guardian. *Ledwith v. Ledwith*, 1 Dem. 154.

The preference of a child over fourteen years of age as to the choice of a guardian of her person is important and the surrogate should examine her privately in order to determine her wishes. *Matter of Burdick*, 41 Misc. Rep. 346; 84 N. Y. Supp. 932.

The powers of a guardian appointed by the court are not restricted by locality. He is recognized as the lawful guardian throughout the state. *Ex parte Dawson*, 3 Bradf. 130.

Where one sister of an infant applies to have a trust company appointed guardian of his estate and the other sister applies for the guardianship of his person and estate, the surrogate may appoint the trust company guardian of the estate and the sister the guardian of the person. *Matter of Buckler*, 96 App. Div. 397; 89 N. Y. Supp. 206.

The practice in a proceeding for the appointment of a guardian by the surrogate's court is similar to the proceedings in testamentary cases. A petition is presented; citations issue to the parties in interest; on the return day a hearing is had and an appropriate decree is entered, based upon the equities of the case. The qualifications of the guardian, and matter of security are treated post, p. 470.

Code Civ. Proc. § 2823. Contents of petition; citation.

A petition, presented as prescribed in the last section, must also state whether or not the father and mother of the petitioner are known to be living. If either of them is known to be living, and the petition does not pray that the father, or, if he is dead, that the mother, may be appointed the general guardian, it must set forth the circumstances which render the appointment of another person expedient; and must pray that the father, or, if he is dead, that the mother, of the petitioner may be cited to show cause, why the decree should not be made. A citation, issued to the father of the petitioner, must be served at least ten days before it is returnable. Where the case is within subdivision second of the last section, the petition must pray that the person formerly appointed general guardian may be cited; unless it is shown that he is dead. The surrogate must inquire, and ascertain as far as practicable, what relatives of the infant reside in his county; and he may, in his discretion, cite any relative or class of relatives of the infant, residing in that county or elsewhere, to show cause why the prayer of the petition should not be granted.

Code Civ. Proc. § 2824. *Id.*, where petitioner is a married woman.

The last section applies, where the petitioner is a married woman; except that her husband must also be cited, and that the surrogate may, in his discretion, make a decree, appointing a guardian of her property, without citing her father or her mother.

Code Civ. Proc. § 2825. Appointment of guardian

Upon the return of the citation, the surrogate must make such a decree in the premises, as justice requires. He may, in his discretion, hear allegations and proofs from a person not a party. Where a citation is not issued, the surrogate must, upon the presentation of the petition, inquire into the circumstances. For the purpose of such an inquiry, or of an inquiry into the amount of security to be required of the guardian, he may issue a subpoena, requiring any person to attend before him, to testify respecting any matter involved therein. If he is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person or of his property, he must make a decree accordingly, except that a guardian of the person of a married woman shall not be appointed. In a proper case, he may appoint a general guardian in one capacity, without a citation and issue a citation, to show cause against the appointment of a general guardian in the other capacity.

General Rule 52. General guardian, appointment of.

Except in cases otherwise provided for by law, for the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which said person bears to the infant, and the nature, situation and value of the infant's estate.

General Rule 53. Age of infant and amount of property to be ascertained by court.

Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upward, shall examine him as

to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount of value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

A surrogate of a county wherein property of an infant of the requisite age is situated, may entertain the application for the appointment of a guardian, irrespective of proceedings instituted under the laws of another state. *Johnson v. Borden*, 4 Dem. 36.

Temporary residence is deemed sufficient. *Matter of Pierce*, 12 How. Pr. 532. If the petition contains allegations sufficient to give the surrogate jurisdiction, and the surrogate proceeds regularly and appoints a guardian, the appointment will be valid until vacated, although the infant never resided in the county. *Dutton v. Dutton*, 8 How. Pr. 99.

Petition must show which of the relatives reside in the county. *Matter of Feeley*, 4 Redf. 306. It should mention the amount of the property to which the infant is entitled within the state so as to enable the court to fix the penalty of the bond. *Johnson v. Borden*, 4 Dem. 36.

If a person other than a living mother or father is sought to be appointed, the petition must show the expediency of appointing another person. *Ledwith v. Ledwith*, 1 Dem. 154.

As to contents of petition, see also *Matter of Van Vranken*, 50 Hun, 607; 20 N. Y. St. Repr. 387; 3 N. Y. Supp. 495.

The citation of relatives is to give the surrogate information as to the proper person to be appointed guardian. *Kellinger v. Roe*, 7 Paige, 362; *Cozine v. Horn*, 1 Bradf. 143;

Ex parte Dawson, 3 Bradf. 130. See also **People v. Wilcox**, 22 Barb. 178; **Matter of Feeley**, 4 Redf. 306.

A guardian cannot be appointed on the father's petition without notice to the mother, as the Domestic Relations Law makes the mother joint guardian with her husband with equal powers, rights and duties. **Matter of Drowne**, 56 Misc. Rep. 417; 107 N. Y. Supp. 1029.

When a guardian of a non-resident infant has been appointed in a foreign state he may apply for ancillary letters in this state if the ward own property here.

Code Civ. Proc. § 2838. Application for ancillary letters to foreign guardians.

1. *Where an infant, who resides without the State and within the United States, is entitled to property within the State, or to maintain an action in any court thereof, a general guardian of his property, who has been appointed by a court of competent jurisdiction, within the State or territory where the ward resides, and has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property, of the ward, may present, to the surrogate's court having jurisdiction, a written petition, duly verified, setting forth the facts, and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed, and has given the security required in this section, which must be authenticated in the mode prescribed in section forty-five of the decedent estate law, for the authentication of records and papers, upon an application for ancillary letters testamentary, or ancillary letters of administration.*

2. *Where an infant who resides without the State and within a foreign country is entitled to personal property within the State, or to maintain an action, or special proceeding in any court thereof respecting such personal prop-*

erty, a general guardian of his property, authorized to act as such within the foreign country where the ward resides, may apply to the surrogate's court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of such infant, and the person so authorized must present to the surrogate's court having jurisdiction a written petition duly verified, setting forth the facts and praying for ancillary letters of guardianship on the personal estate of such infant. The petition must be accompanied with the exemplified copies of the records and other papers showing the appointment of such foreign guardian, or where such foreign guardian has not been appointed by any court with other proof of his authority to act as such guardian within such foreign country, and also with proof that pursuant to the laws of such foreign country, such foreign guardian is entitled to the possession of the ward's personal estate. Exemplified copies of the records, where used pursuant to this subdivision, must be authenticated by the seal of the court, or officer, by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate, under the principal seal of the department of foreign affairs, or the department of justice of such country, attested by the signature or seal of a United States consul.

Code Civ. Proc. § 2839. Proceedings thereupon.

Where the surrogate is satisfied, upon the papers presented, as prescribed in the last section, that the case is within that section, and that it will be for the ward's interest, that ancillary letters of guardianship should be issued to the petitioner, he may make a decree granting ancillary letters accordingly. Such a decree may be made without a citation, or the surrogate may cite such persons

as he thinks proper, to show cause, why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must inquire, whether any debts are due from the ward's estate to residents of the State; and if so, he must require payment thereof.

Code Civ. Proc. § 2840. Effect of ancillary letters.

Ancillary letters of guardianship are issued as prescribed in the last section, without security and without an oath of office. If issued in a case provided for in subdivision one, of section twenty-eight hundred and thirty-eight, they authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property of the ward; to dispose of them in like manner as a guardian of the property appointed as prescribed in this article; to remove them from the State, and to maintain or defend any action or special proceeding in the ward's behalf. If issued in a case provided for in subdivision two of section twenty-eight hundred and thirty-eight, such ancillary letters of guardianship authorize the person to whom they are issued to demand and receive the personal estate of the ward, and to dispose of it in like manner as a guardian of property appointed as prescribed in this article, and to maintain or defend any action or special proceedings respecting such personal estate in the ward's behalf. But in neither case do such letters authorize such ancillary guardian to receive from a resident, guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a surrogate's court, money or other property belonging to the ward, in a case where letters have been issued to a guardian of the infant's property, from a surrogate's court of a county within the State, upon an allegation that the infant was a resident of that county, except by the special direction, made upon good cause shown, of the surrogate's court from which the principal letters were issued, or unless the principal letters have been duly revoked.*

* So in the original.

Code Civ. Proc. § 2841. Application of the last section to former guardians.

The last section applies to letters granted, before this chapter takes effect, by a surrogate's court of the State, to a guardian appointed by a court of another State, or a territory of the United States, upon presentation of an exemplified transcript of the record of his appointment.

QUALIFICATIONS FOR GUARDIANSHIP.

In the appointment of a guardian the welfare of the infant is the chief consideration.

Parents and relatives, if otherwise qualified, have the prior right (and the preferences of an infant over fourteen years of age must be considered); but if for the best interests of the ward the guardianship may be given to third persons.

Trust companies and certain benevolent corporations may be appointed guardian of the property.

While the surrogate has discretionary power to appoint a stranger as guardian of the person and property of an infant, that power should not be exercised where there is a relative of the infant competent and desirous of being appointed. *Matter of Buckler*, 96 App. Div. 397; 89 N. Y. Supp. 206.

The power of appointment of a guardian of an infant whose parents are living should not be exercised, except in cases where the parents appear to be unfit for the control of, or have interests which are adverse to, the infant. *In re Barre*, 5 Redf. 64.

The interests of an infant, rather than the wishes of those desiring the appointment, should control. *Smith v. Smith*, 2 Dem. 43; *Foster v. Mott*, 3 Bradf. 409.

Consent of relatives is not necessary. *Ex parte Danson*, 3 Bradf. 130. Nor need a relative be appointed in preference to all others. *Holley v. Chamberlain*, 1 Redf. 333. The mother may be deprived of the custody of the children,

where it is for their best interests. *Petition of Schroeder*, 17 Week. Dig. 71; *Burmeister v. Orth*, 5 Redf. 259; *Matter of Meech*, 25 N. Y. St. Repr. 167; 7 N. Y. Supp. 257.

The mother should be given the preference if the children are young, and in need of her care, she being a suitable person. *Matter of Pray*, 60 How. Pr. 194.

Dying requests of parents should be considered. *Underhill v. Dennis*, 9 Paige, 202; *Matter of Pierce*, 12 How. Pr. 532; *Bennett v. Byrne*, 2 Barb. Ch. 216; *Matter of De Marcellin*, 24 Hun, 207. Such wishes may be overruled in the discretion of the court. *Cozine v. Horn*, 1 Bradf. 143. Considerations affecting the health and welfare of the infants may justify the court in withholding their custody, temporarily, even from the legal guardians; being discretionary, appellate courts should not interfere, unless some manifest error or abuse of discretion is made to appear. *Matter of Welch*, 74 N. Y. 299; *Matter of Vandewater*, 115 N. Y. 669.

The sole executor of the estate of a deceased father should not be appointed guardian. *Rickard's Case*, 15 Abb. Pr. N. S. 6. A stranger could not be appointed without notice to relatives. *Id.* The home and surroundings of the parties seeking the custody of the infant should be considered. *Underhill v. Dennis*, 9 Paige, 202.

A surrogate may, as a condition of awarding the custody of a child to a person, require such person to permit access to his ward by such persons as the court may designate. *Derickson v. Derickson*, 4 Dem. 295. The court may also attach the condition that the child be allowed to reside with the parents. *Smith v. Smith*, 2 Dem. 43.

By Banking Law (1909), § 186,

Trust companies incorporated under that act are empowered to act as guardian when so appointed by the court.

TRUST COMPANIES AS GUARDIANS.

By Banking Law (1909), § 187,

*By Banking Law (1909) § 187, trust companies having qualification of residence, capital, etc., in said law prescribed, " may be appointed guardian, trustee or administrator with or without the will annexed on the application or consent of any person acting as such or entitled to such appointment and in the place and stead of such person; or such trust company may be joined with any person so acting or entitled to such appointment; but such appointments shall be made upon such notice, as is required by law, to the persons interested in the estate or fund, and on the consent of such of the principal legatees or other persons interested in the estate or fund as the court, surrogate or judge making the appointment shall deem proper. No appointment hereunder shall be deemed to increase the number of persons entitled to full compensation beyond the number so entitled under the terms of the will or deed creating a trust or appointing a guardian or authorized by law. Whenever a person is joined with such trust company in any appointment as guardian, trustee or administrator * * * his appointment may be under such limitation of powers and upon such terms and conditions as to deposit of assets by such person with such trust company or otherwise, and upon such reduced bond or security to be given by him as the court, surrogate or judge making the appointment shall prescribe."*

The Banking Law (1909), § 189,

The Banking Law (1909) § 189, provides among other things as follows: " Any court or officer having authority to grant letters of guardianship of any infant may, upon the same application as is required by law for the appointment of a guardian of such infant, appoint any such corporation as guardian of the estates of such infant," etc.

By Banking Law (1909) § 190,

No bond or other security is required from such corporation as guardian; but the court upon proper application may require the cor-

poration to give security, and revoke the appointment on failure to do so. Specially Chartered Trust companies have the same powers. *Id.*, § 197.

By chapter 67 of the Laws of 1902 the Hebrew Sheltering Guardian Society, of New York, is empowered to act as general guardian of the person and property of infants under its care and control.

By section 122 of the Membership Corporations Law of 1909, a corporation formed for the purpose of preventing cruelty to children may be appointed guardian of the person of a minor child during its minority by a court of record or a judge thereof.

While a testamentary guardian, or a guardian appointed by deed, cannot be required to give security except for cause shown (see ante, p. 453), the court on appointing a general guardian of the property of an infant must require him to give security, and may also require a guardian of the person to give security.

Where a guardian receives the proceeds of a sale of his ward's real estate he may be required to give further security.

Code Civ. Proc. § 2829. Inquiry as to value of property.

Where a general guardian of the property of an infant is appointed, as prescribed in this article, the surrogate must inquire into the infant's circumstances, and must ascertain, as nearly as practicable, the value of his personal property, and of the rents and profits of his real property.

Code Civ. Proc. § 2830. Qualification of guardian of property.

Before letters of guardianship of an infant's property are issued by the surrogate's court, the person appointed must, besides taking an official oath, as prescribed by law, execute to the infant, and file with the surrogate, his bond, with at least two sureties, in a penalty, fixed by the surrogate, not less than twice the value of the personal property, and of the rents and profits of the real property; conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust, and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his guardianship, whenever he is required so

to do, by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property and of the rents and profits of the real property for the term of three years. But in case where it appears to be impracticable to give a bond sufficient to cover the whole amount of the infant's personal property the surrogate may, in his discretion, accept security, to be approved by the surrogate, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive; and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant until the further order of the surrogate on additional further satisfactory security.

Code Civ. Proc. § 2831. Id.; of guardian of person.

Before letters of guardianship of an infant's person are issued by the surrogate's court, the person appointed must take the official oath as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned, that the guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate's court.

General Rule 54. (Amended 1910.) Bond of a general guardian,

The security to be given by the general guardian of an infant shall be a bond in the penalty of double the amount of the personal estate of his ward and of a gross amount or value of the rents or profits of the real estate during his minority. The bond shall be executed by the guardian, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond over and above all debts. If, however, the total

amount of the personal estate of an infant and of the gross amount or value of the rents or profits of the real estate during his minority shall exceed twenty-five hundred dollars, then the bond must be the bond of a surety company authorized to do business in this State, or the general guardian may give a bond secured by a mortgage on improved and unencumbered real property of the value of the penalty of the bond.

The court in its discretion may vary the security where from special circumstances it may be found for the interest of the infant, and may direct the principal of the estate and any part thereof to be invested in the stocks of the State of New York or of the United States, or deposited with any trust company which shall have been designated as a depository for such moneys, or invested in bond and mortgage on unencumbered and improved property of at least double the value of the amount invested, to be shown to the satisfaction of the court, for the benefit of the infants, and that the interest or income thereof only be received by the guardian.

General Rule 51 (in part. Amended 1910).

Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to an infant sold under a decree, judgment or order of the court until the guardian has given such further security for the faithful discharge of his trust as the court may direct. In case, however, such proceeds shall exceed the sum of five hundred dollars the court shall require the guardian to give a bond, in the penalty of double the amount to be paid to the guardian, such bond to be that of a surety company authorized to do business in this state or secured by a mortgage on improved and unencumbered real property worth the amount of the penalty of the bond.

General Rule 59. (Amended 1910.) When proceeds to be paid to general guardian; petition therefor.

No money arising from the sale of the real estate of an infant shall be paid over to his general guardian except

so much thereof or of the interest or income from time to time as may be necessary for his support or maintenance unless such guardian shall give a bond in the penalty of double the amount to be paid to him with sufficient surety to be approved by the court. In case, however, such money shall exceed the sum of five hundred dollars the court must require the guardian to give a bond of a surety company authorized to do business in this state or a bond secured by a mortgage on improved and unencumbered real property of a value of the penalty of the bond.

No order shall be made for the payment of any such moneys to any person, except upon petition, accompanied by a certified copy of the order, in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the fund, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon.

Where the guardian's responsibility becomes precarious, the court may order the money in the guardian's hands to be brought into court, or that further security be given. *Monell v. Monell*, 5 Johns. Ch. 284. Where one of the sureties has become insolvent, further security must be given, before the court will order money to be paid to guardian. *Genet v. Tallmadge*, 1 Johns. Ch. 561.

The requirement of rule 59 of the General Rules of Practice, that moneys arising on the sale of an infant's lands shall not be paid to his general guardian unless he has previously given sufficient security on improved and unincumbered real estate, is not satisfied by the bond of a surety company. *Matter of Flynn*, 58 Misc. Rep. 628; 111 N. Y. Supp. 1023; *affd.* without opinion, 129 App. Div. 907; 113 N. Y. Supp. 1132.

Although a general guardian has given the bond required by section 2830 of the Code, he must, before receiving the legacy for his ward, execute a further bond as required by section 2746. *Matter of Miller*, 29 Misc. Rep. 272; 61 N. Y. Supp. 243.

Liability of Sureties.

A ward whose general guardian has died insolvent after appropriating the trust funds without leaving assets in this state may maintain a suit in equity against the surety to compel the payment of the sum due. *Parker v. Dominick*, 105 App. Div. 440; 94 N. Y. Supp. 249.

The surety of a general guardian is liable for moneys of the ward in the hands of the guardian at the time of his appointment if he converted the same. *Matter of Fardette v. U. S. Fidelity Co.*, 86 App. Div. 50; 83 N. Y. Supp. 521.

Where the County Court directs the proceeds of the sale of a ward's real estate to be paid to his guardian without requiring additional security as the court in its discretion may do, the sureties of the guardian are liable to the ward for the proceeds of the sale, where the guardian failed to pay over the same at the infant's majority. *Allen v. Kelly*, 171 N. Y. 1.

The surety upon the bond of a guardian is entitled as a matter of right to be discharged upon notice to the principal, since the amendment to section 812 of the Code of Civil Procedure made by chapter 524 of the Laws of 1900. *Matter of American Surety Co.*, 61 Misc. Rep. 542; 115 N. Y. Supp. 860.

An action cannot be maintained against the sureties of a general guardian in the absence of an accounting in the Surrogate's Court, and a decree establishing the extent of the deficiency. An order made on the petition of a substituted guardian vacating the accounts of a former guardian and ordering her to pay a sum stated to her successor is not a

judicial settlement which will support an action against her sureties. *Rouse v. Payne*, 120 Div. 667; 105 N. Y. Supp. 549.

Where a guardian has removed to another state, and died intestate without leaving property in either state, a final settlement of the guardian's accounts is not a condition precedent to a suit in equity against the sureties on his bond. *Otto v. Van Riper*, 164 N. Y. 536.

The rule that an action cannot be maintained against the sureties of a general guardian until he has accounted, and his default is established, does not obtain where it appears that the guardian is insolvent and has absconded so that the ward cannot ascertain his whereabouts or serve him with process. *Kurz v. Hess*, 86 App. Div. 529; 83 N. Y. Supp. 773.

The sureties on the bond of a general guardian, whose executrix has been adjudged to pay a certain sum to the ward, are concluded by such decree in the absence of fraud. *Martin v. Hann*, 32 App. Div. 602; 53 N. Y. Supp. 186.

Sureties are not liable for payment of costs in proceedings to remove a guardian, nor for counsel fees and costs in an action instituted by the ward against the guardian because of his fraudulent acts in proceedings instituted for the sale of the ward's property. *Clark v. Montgomery*, 23 Barb. 464.

Where a bond of a guardian has been assigned to a subsequent guardian, the latter may bring an action in his own name thereon. *Beams v. Gould*, 8 Daly, 384. An accounting is not a prerequisite to an action upon the bond, where the liability may be determined as definitely in another manner. A demand is not necessary where the guardian has wrongfully converted to his own use the money of the ward. *Girvin v. Hickman*, 21 Hun, 316. But see *Perkins v. Stim-mell*, 114 N. Y. 359.

Where a general guardian failed to account to his ward for moneys realized from the sale of real property of the ward under statutory proceedings for that purpose, it was held that the guardian's sureties were liable therefor on their bond, even though the guardian did not give additional security as required by section 2361 of the Code and Court Rule 59. *Allen v. Kelly*, 55 App. Div. 454; 67 N. Y. Supp. 97.

RIGHTS AND DUTIES OF GUARDIANS.

A general guardian is a trustee of an express trust and may sue as such; but where an action is brought in the name of an infant a guardian *ad litem* should be appointed.

Where a general guardian has invested his ward's property with persons who have converted it, he may sue as trustee of an express trust without the appointment of a guardian *ad litem* for the infant; though where the cause of action exists directly in favor of the infant it should be brought by a guardian *ad litem*. *Schlieder v. Dexter*, 114 App. Div. 417; 99 N. Y. Supp. 1000.

A general guardian of an infant appointed to succeed a deceased general guardian may maintain an action against the sureties of the latter guardian to recover a sum adjudged to be due from the administrator of the deceased guardian. It is not necessary that the general guardian be appointed a guardian *ad litem* for that purpose nor is it necessary that an execution be first issued upon the surrogate's decree and returned unsatisfied. *Van Zandt v. Grant*, 175 N. Y. 150.

A general guardian may sue in his own name to recover a debt due his ward. Code Civ. Proc. § 469, relates only to actions brought in the name of an infant, and does not conflict with the right of a general guardian to maintain an action in his own name. *Harnett v. Morris*, 10 Civ. Proc. Rep. 223. See also *Hauenstein v. Kull*, 59 How. Pr. 24; *Thomas v. Bennett*, 56 Barb. 197; *Segelken v. Meyer*, 14 Hun, 593; *Davis v. Carpenter*, 12 How, Pr. 287. Such guardian may also sue to recover money received by the defendant by collecting the rents and profits of the land of the ward. *Coakley v. Mahar*, 36 Hun, 157, citing *Field v. Schieffelin*, 7 Johns. Ch. 150, 154; *Thacker v. Hendrickson*, 63 Barb. 271; *Pond v. Curtiss*, 7 Wend. 45; *White v. Parker*, 8 Barb. 48, 52; *Chapman v. Tibbits*, 33 N. Y. 289.

The better practice in bringing an action, designed for the protection of the property of an infant, or for its recovery, is to bring the action in the name of the infant, represented by a guardian appointed for the purposes of the particular action. *Carr v. Huff*, 57 Hun, 18; 32 N. Y. St. Repr. 26; 10 N. Y. Supp. 361. In this case, it was stated: "By the Revised Statutes the guardian is required to take the custody and management of the personal estate of the minor, together with the profits of the real estate, and is authorized to bring such action in relation thereto, as a guardian in socage might by law. We perceive in the provisions of the Code no language which works a repeal of this statute, and, consequently, the same must be deemed in force, although as above stated, under the general scope and purpose of the Code of Civil Procedure, an infant should be represented by a person specially designated by the court or judge to take care of his interests in each particular action." And see also *Perkins v. Stimmel*, 114 N. Y. 359; *Coakley v. Mahar*, 36 Hun, 157; *Bayer v. Phillips*, 17 Abb. N. C. 425; *Weiler v. Nembach*, 114 N. Y. 36.

A general guardian may sue on an administrator's bond, where, on the settlement of the administrator's accounts, a payment is ordered to be made to him, and execution on the judgment therefor is returned unsatisfied. *Prentiss v. Weatherly*, 68 Hun, 114; 52 N. Y. St. Repr. 80; 22 N. Y. Supp. 680, citing Code Civ. Proc. § 2607.

The guardian of an infant owning an overdue mortgage on lands may appoint an attorney to collect the debt, and authorize him to satisfy the mortgage when paid. *Forbes v. Reynard*, 113 App. Div. 306; 98 N. Y. Supp. 710.

A general guardian has no power to submit a cause of action either on behalf of or against an infant, so as to give the court jurisdiction to adjudicate upon the rights of the infant. *Coughlin v. Fay*, 68 Hun, 521; 52 N. Y. St. Repr. 661; 22 N. Y. Supp. 1096.

A petition for the sale of real estate of an infant over fourteen years of age made solely by his general guardian, is insufficient to give validity to the sale; the infant must join in the petition pursuant to the requirements of section 3249 of the Code of Civil Procedure. *Rosenfeld v. Miller*, 131 App. Div. 282; 115 N. Y. Supp. 692.

It is not proper for the court to deplete a small fund belonging to infants by the costs and allowances of an equity action which was needless. *Sands v. Sands*, 30 Misc. Rep. 338; 63 N. Y. Supp. 481.

In *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372 a female ward upon reaching majority was permitted to maintain an action against her general guardian to recover damages for her seduction while under the age of consent.

The relation of guardian and ward is analogous in many respects to that of parent and child.

The guardian of the person can determine the residence of the ward; but he may be restrained from removing him beyond the jurisdiction.

When the guardian makes the ward a member of his household so as to be entitled to his services he is not liable to pay the ward for services rendered, nor can he charge the ward for maintenance furnished, except the charge be authorized by the court.

But a guardian, where he is not also the parent, is not obliged to support his ward.

The power and reciprocal duty of a guardian and ward are the same *pro tempore* as that of father and child. 1 Bl. Com. 462.

The right of a parent or guardian to change the residence of an infant from one state to another, is subject to the power of the court to restrain an improper removal, even by a parent. *Wood v. Wood*, 5 Paige, 596; *Wilcox v. Wilcox*, 14 N. Y. 575. The guardian has power to change the domicile of the ward from one county to another in the state, for such change still keeps the ward within the protection of the same general law. *In re Bartlett*, 4 Bradf. 221.

As an infant is *non sui juris* she cannot change her domicile but her testamentary guardian may do so, where he acts in good faith and for the benefit of the infant. *Matter of Kiernan*, 38 Misc. Rep. 394; 77 N. Y. Supp. 924.

A guardian cannot bind his ward as a servant for a period longer than the ward's minority. *Ide v. Brown*, 178 N. Y. 26.

The rule that where parties sustain the relation of parent and child, either by nature or adoption, the former, in the absence of an express promise, cannot be required to pay for services rendered by the child, nor the latter be obliged to pay for maintenance, is applicable to the relationship of guardian and ward, and a guardian's claim for support of a ward whom he had adopted into his family should not be allowed. Although a surrogate might grant a guardian relief from a strict application of the rule, in a case presenting equities in his favor, such equities do not exist where the guardian took the child with the avowed intent of supporting him gratuitously, and the evidence would warrant the finding that the child's services were worth the cost of his support. *Otis v. Hall*, 117 N. Y. 131, citing *Hyland v. Baxter*, 98 N. Y. 610.

A guardian is bound to maintain his ward from the income of the estate, but he is not bound to furnish the support personally, and no promise on his part will be implied, without his consent, to pay even for necessities furnished the ward. *Tiffany Dom. Rel.* 310.

It is not the guardian's duty to contribute to the support of the ward out of his own funds. *Voessing v. Voessing*, 4 Redf. 360.

In general, it is the duty of the guardian to see that infants support themselves, wholly or partially, and he must show clear and satisfactory reasons, for advances made to or payments made on account of the infants from the trust fund. *Kelahr v. McCahill*, 26 Hun, 148, citing *Clark v. Montgomery*, 23 Barb. 464; *Matter of Ryder*, 11 Paige, 185; *Van Valkenburgh v. Watson*, 13 Johns. 480; *Clark v. Clark*, 8 Paige, 152.

In the last case the chancellor held that it is a palpable breach of duty for a guardian to suffer a ward to live in idleness when he is able to earn his own support, unless he is preparing himself for future usefulness by obtaining an education, and that he could not, in the absence of all evidence on the subject, presume that the ward did not earn his own living during the time that he remained with the guardian.

A general guardian as such is not entitled to the services or society

of his ward and cannot bind the ward's person or property unless expressly authorized by statute. *Aborn v. Janis*, 62 Misc. Rep. 95; 113 N. Y. Supp. 309.

A guardian who expects to charge his ward for maintenance furnished, or desires to expend the ward's property for that purpose, should obtain an order from the court authorizing such charge or expenditure. Otherwise it may be disallowed on his final accounting. He expends the ward's property at his peril, except when authorized by court.

It is true that the court on a final accounting may allow unauthorized expenditures, but the guardian takes the hazard.

On a proper showing the court may authorize not only the expenditure of the ward's income, but of his principal.

Code Civ. Proc. § 2846. Surrogate may direct as to infant's maintenance.

Upon the petition of the general guardian of an infant's person or property; or of the infant, or of any relative or other person in his behalf; the surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application, by the guardian of the infant's property, to the support and education of the infant, of such a sum as to the surrogate seems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal.

A natural guardian may petition for an order directing the general guardian to apply the infant's property to the infant's support and education. *Quin v. Hill*, 6 Dem. 39.

This section does not provide for the payment of a debt already incurred. *Welch v. Gallagher*, 2 Dem. 40.

The petition should show the amount of net income of the estate; and, in case of a testamentary provision by a mother, the station in life and accustomed manner of living of the decedent's family, and the inability of the father to furnish the necessary means for the purposes mentioned. *Norton v. Sillcocks*, 4 Dem. 145.

A mother as guardian in socage of her infant children may use so much of their property as is necessary to support and educate them, but before so doing, she should obtain permission from the court. But even where she has expended the income from the property for such purpose without permission, she may counterclaim the sum expended in an action for partition brought by the minor on attaining his majority. *Williams v. Clarke*, 82 App. Div. 199; 81 N. Y. Supp. 381.

The surrogate may direct that moneys accumulated for an infant under a valid testamentary provision may be applied when necessary to his support and education. *Matter of Wagoner*, 81 App. Div. 163; 80 N. Y. Supp. 785.

The obligation to support and educate an infant rests upon the father, if financially able to discharge such obligation. If the parents be dead, such duty devolves upon the general guardian and amounts expended by him for such purposes may be taken out of the estate of the infant. *Murphy v. Holmes*, 87 App. Div. 366; 84 N. Y. Supp. 806.

Where a mother is appointed general guardian and the child lives with its mother and stepfather in the latter's house, and the mother pays nothing for his board, she is not entitled to an allowance out of the child's estate for the board thus furnished to the child. *Quære*, as to the stepfather's right to enforce such a claim. *Matter of Grant*, 56 App. Div. 176; 67 N. Y. Supp. 654; *affd.*, 166 N. Y. 640.

A father who is appointed guardian of his infant daughter, having an income of at least \$7,000 a year, will not be allowed an unauthorized expenditure for his daughter's education. *Matter of Wilber*, 27 Misc. Rep. 53; 57 N. Y. Supp. 942.

Where a trust company appointed temporary guardian of the property of an infant has employed an agent to collect the rents, the court in its discretion may disallow the sum paid the agent on an account-

ing. *Matter of Binghamton Trust Co.*, 87 App. Div. 26; 83 N. Y. Supp. 1068.

The guardian should expend no more than the income of the ward for his support and education, without obtaining an order of the court for that purpose. If he expend any part of the principal without such order, he takes the chance of losing it, if not approved by the court. *Matter of Bushnell*, 17 N. Y. St. Repr. 813; 4 N. Y. Supp. 472.

Where by decree a former guardian was directed to pay the entire net income of a trust estate to his ward's father, to be used by him for support, and where the father was subsequently appointed guardian, he is entitled to the protection of the former decree upon his accounting and should not be held to the same strictness in furnishing vouchers for his payments as is ordinarily required of guardians. *Matter of Plumb*, 24 Misc. Rep. 249; 53 N. Y. Supp. 558.

Where the income of a child derived from a trust is over \$4,000 a year and he is sickly and requires expensive medical treatment and must contribute to the household expenses, an allowance of \$2,000 to the guardian for the annual support and maintenance of the child is not excessive. *Matter of Goodwin*, 122 App. Div. 800; 107 N. Y. Supp. 784.

The statute does not authorize the surrogate to compel a general guardian to pay a claim of a guardian ad litem, where the validity of the claim has not been established. *Matter of Hampton*, 23 N. Y. Supp. 280. The surrogate may require a guardian to contribute to the support of his ward, notwithstanding the ward refuses to abandon the people with whom he had been living for years and reside with the guardian. *Matter of Wentz*, 9 Misc. Rep. 240; 61 N. Y. St. Repr. 302; 30 N. Y. Supp. 211.

Where a ward boards in the family of her guardian, and in fact renders services of value, those services should be allowed as a claim to reduce the charges for board. *Matter of Clark*, 36 Hun, 301.

A mother who secured the custody of her child on *habeas corpus* proceedings is not entitled to charge the expenses thereof to the infant's estate upon being appointed his general guardian. *Matter of Grant*, 56 App. Div. 176; 67 N. Y. Supp. 654; *affd.* 166 N. Y. 640.

Unauthorized expenditures allowed.

A surrogate on settling the judicial accounts of a guardian who is father of the ward may allow him expenses incurred in the support of the ward although made without an order of the court. *Matter of Putney*, 61 Misc. Rep. 1; 114 N. Y. Supp. 556.

Where a mother is general guardian of an infant, the

mother should on the final accounting be allowed such sum as she would be allowed for the support of the child if she had made an application to the surrogate at the earliest possible date for an order fixing a sum for such purpose. *Matter of Klunck*, 33 Misc. Rep. 267; 68 N. Y. Supp. 629.

A man is under no legal obligation to maintain his step-daughter, an infant, but the general guardian of the latter may contract with him for her support, and on settlement of his accounts, is entitled to be allowed such reasonable sum as he has, in good faith, paid for that purpose. *Matter of Ackerman*, 116 N. Y. 654.

A ward on attaining majority may ratify unauthorized expenditures made by her guardian if there was no concealment or fraud on his part. *Norris v. Norris*, 85 App. Div. 113; 83 N. Y. Supp. 77.

Advances made by a guardian to his ward to furnish a house will be allowed to the guardian upon accounting, where the ward affirms the transaction upon her majority. *Matter of Plumb*, 24 Misc. Rep. 249; 53 N. Y. Supp. 558.

Expenditure of principal.

Where the ward's funds are small and more means are necessary to the due maintenance of the ward than can be derived from the income, the capital may be broken in upon, only to the extent necessary to answer the proper demands of the ward. The burden of showing the necessity of the encroachment rests upon the guardian. The court will not allow expenditures which were not warranted by the circumstances. *Matter of Wandell*, 32 Hun, 545; *Oakley v. Oakley*, 3 Dem. 140.

Where it is determined that it is necessary to sell an infant's real estate to provide for his support and maintenance, the court may order the proceeds to be turned over to his guardian. *Allen v. Kelly*, 171 N. Y. 1.

Expenses incurred by a guardian in the education and support of his ward, in excess of the funds in his hands and applicable thereto, though necessary and proper, cannot be charged against or ordered to be paid out of an estate which the ward may have in the lands of an executor, of which the income alone is applicable to education and support, and of which the principal is to be paid to the ward at majority, as that would require a violation of the provisions of the will; and in such case the guardian can only be allowed the amount of the fund in his hands, together with the income which has accrued upon the ward's share of the estate. *Smith v. Bixby*, 5 Redf. 196.

The surrogate cannot authorize the support of an infant out of the principal of the estate, while interest remains uncollected and the debtors are solvent. *Matter of Plumb*, 22 N. Y. St. Repr. 547; 54 Hun, 637. The infant cannot be authorized to expend her own estate. The expenditure must be made through her guardian. *Idem*.

A guardian must conserve any property of his ward that comes into his custody, together with the rents and profits thereof. He is liable to account therefor. If he make or suffer any waste of the inheritance of his ward he is liable in treble damages.

Domestic Relations Law. § 83. Duties and liabilities of all general guardians.

A general guardian or guardian in socage shall safely keep the property of his ward that shall come into his custody, and shall not make or suffer any waste, sale or destruction of such property or inheritance, but shall keep in repair and maintain the houses, gardens and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his possession; and shall deliver the same to his ward, when he comes to full age, in at least as good condition as such guardian received the same, inevitable decay and injury only excepted; and shall answer to his ward for the issues and profits of the real estate, received by him, by a lawful account, to be settled before any court, judge or surrogate having authority to settle the accounts of general and testamentary guardians; and any order, judgment or decree in any action or proceeding to settle such accounts may be enforced to the

same extent, and in like manner as in the case of general and testamentary guardians. If any guardians shall make or suffer any waste, sale or destruction of the inheritance of his ward, he shall lose the custody of the same, and of such ward, and shall forfeit to the ward treble damages.

A general guardian or guardian in socage has no power to commit waste by cutting and removing timber from the land, except for necessary repairs of buildings. *Torry v. Black*, 58 N. Y. 185.

A guardian who has cut timber from the lands of his ward may, in an action for damages, set up that the avails were applied to the support of the ward. *Holbrook v. Wells*, 8 Week. Dig. 391.

A guardian guilty of *devastavit* is not entitled to commissions. *Martin v. Hann*, 32 App. Div. 602; 53 N. Y. Supp. 186.

Where a guardian acting under an order of the court necessarily sells his ward's lands for about half of their value, and all his proceedings indicate carelessness if not dishonesty, the surrogate may charge him with the resulting loss upon his accounting, with interest, and deny him commissions. *Matter of Nowak*, 38 Misc. Rep. 713; 78 N. Y. Supp. 288.

As a guardian is a trustee, if he purchase his ward's property, the transaction is voidable, at the election of the ward, but not void.

Where a guardian in socage, being assignee of a mortgage on lands devised to his ward, purchases the lands on foreclosure the purchase is not absolutely void, but is voidable at the election of the ward. *Jefferson v. Bangs*, 197 N. Y. 35; *Boyer v. East*, 161 N. Y. 580.

A general guardian who purchases his ward's lands on foreclosure is guilty of a breach of duty and holds the lands as trustee for his ward who may compel him to account for the rents and profits. *Coley v. Tallman*, 107 App. Div.

445; 95 N. Y. Supp. 339; *affd.* without opinion, 186 N. Y. 569.

Where a guardian in socage purchases the lands of his ward on foreclosure, the ward may avoid the sum without showing actual fraud or injury, and may maintain an action to disaffirm the sale during minority. The statute of limitations begins to run at the time the guardian purchased the property and not at the time the infant attained majority. But the title of one who purchased in good faith from the guardian in socage without knowledge of the relation is superior to that of the infant. *Cahill v. Seitz*, 93 App. Div. 105; 86 N. Y. Supp. 1009.

Where a guardian purchased his ward's lands on foreclosure and it is apparent that otherwise no surplus would be raised and the guardian is ready to convey to his ward, he should be allowed interest at four per cent on the moneys advanced, but he will be charged with the legal interest on rents retained by him. *McCormick v. Shannon*, 127 App. Div. 745; 111 N. Y. Supp. 875.

A purchase by a guardian *ad litem* of his ward's lands on foreclosure is voidable, not void. The statute of limitations of an action to avoid the purchase is ten years except as postponed by infancy. *Dugan v. Sharkey*, 89 App. Div. 161; 85 N. Y. Supp. 778.

The restriction of section 1679 of the Code, which prohibits the guardian of an infant party from purchasing or being interested in the purchase of any property sold, etc., applies only to guardians *ad litem* and not to guardians in socage. *Boyer v. East*, 161 N. Y. 580.

A guardian should not purchase the dower interest in the lands of his ward, or remove a cloud upon the title of such lands, without proper application to the court, and obtaining an order therefor. *Rickard's Case*, 15 Abb. Pr. N. S. 6.

A purchase at foreclosure for her own benefit, by one who was guardian in socage of infant defendants, is valid, when authorized by

the judgment and necessary for the protection of personal rights. *Lucky v. Odell*, 46 N. Y. Super. Ct. 547.

The purchase by a testamentary guardian of his ward's land at partition sale is merely voidable and not void. *Munsell v. Munsell*, 33 Misc. Rep. 185; 68 N. Y. Supp. 329.

A guardian holding trust funds may make the same investments as are authorized in the case of executors and administrators. All contracts affecting the ward's property, not authorized by the court, are unenforceable unless beneficial to the ward.

The ward may reclaim property from a third person who receives it from the guardian, with actual or constructive notice of the trust, unless transferred in the proper administration thereof.

Domestic Relations Law. § 85. Investment of trust funds by guardian.

A guardian holding trust funds for investment has the powers provided by section one hundred and eleven of the decedent estate law for an executor or administrator.

Decedent Estate Law. § 111. Investment of trust funds.

An executor, administrator, trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon. Any executor, administrator, trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge or payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself.

See also Personal Property Law, § 21, to the same effect.

Contracts of guardians touching the property of their

wards will not be enforced unless they are strictly equitable and for the interests of the infants. *Sherman v. Wright*, 49 N. Y. 227.

The relation between a general guardian and an infant ward is that of trustee and *cestui que trust*. The general guardian has no authority to carry on business under the name of his ward, or to employ therein the capital or credit of the latter. If he embarks the property of his ward in business, without express or sufficient authority, he is guilty of a breach of trust and *devastavit* of the trust property. If he invests trust funds in the hands of a third person, who has knowledge of their character, they still remain impressed with the obligations of the trust in the hands of the holder, and are subject to be reclaimed. It is beyond the power of a trustee to bind his ward's estate by any contract with third parties who have knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust. See this case as to fraudulent mortgaging of infant's real property by his guardian, and for the form of complaint for relief from the fraud. *Warren v. Union Bank of Rochester*, 157 N. Y. 259.

Where a guardian having deposited moneys belonging to his ward and moneys belonging to a corporation of which he is manager in the same account, signs a check as guardian and delivers it in payment of a debt due from the corporation, the payee has presumptive notice that the funds drawn upon belong to the ward and he is put upon inquiry to ascertain the guardian's authority to apply the money in payment of the debt of the corporation. *Cohnfeld v. Tanenbaum*, 176 N. Y. 126.

The general guardian of an infant has power to sell stock left to the infant by will at a price which is adequate. Such sale is only voidable where the price is inadequate. *Cable v. Cable*, 111 App. Div. 426; 97 N. Y. Supp. 773.

A guardian who, instead of selling partly paid contracts for the purchase of land, under circumstances that make it his duty to do so, assumes to compromise with the vendor, and surrender the contracts on receiving a deed in his own name for a part of the land, transcends his powers, and the ward, when of full age, may repudiate or affirm the transaction. *White v. Parker*, 8 Barb. 48. The infant alone can disavow the guardian's act in excess of authority. *Burdick v. Jackson*, 7 Hun, 488.

A general guardian cannot invest his ward's personal property in real estate without obtaining authority from the Supreme Court, nor can he invest it in bank stock or bonds of a foreign corporation. Nor can he have commissions on annual rents, nor commissions upon the principal reinvested, nor can he charge the ward's estate with legal expenses incurred in attempting to get himself discharged as guardian before the ward's majority. *Matter of Decker*, 37 Misc. Rep. 527; 76 N. Y. Supp. 315.

A guardian cannot invest his ward's funds in a mortgage upon his own property, which he conveys to the ward's father after the receipt of such funds, and which mortgage proves to be insufficient security. The ward may disaffirm the transaction and recover the funds. The court charged the guardian with only 3 per cent. interest. *Matter of Terry*, 31 Misc. Rep. 477; 65 N. Y. Supp. 655.

Where a guardian executed individually to himself, as guardian, a mortgage for moneys of his ward in his hands, and afterwards sold the land subject to the mortgage, and thereafter brought an action to foreclose the mortgage, it was held that the parties were estopped by the judgment of foreclosure from questioning the validity of the mortgage, and so long as the money was realized, the ward could not complain, and the mortgage would not prevent conferring a good title. *Lyon v. Lyon*, 67 N. Y. 250.

A contract by a general guardian for the exchange of the ward's lands cannot be enforced, although the other party has gone into possession. *Bellinger v. Roatstone*, 6 Week. Dig. 69.

TERMINATION OF GUARDIANSHIP.

All guardians may be removed for misconduct, incompetency, removal from the State, and like causes specifically set forth in the statute.

If appointed by will or deed, a guardian can only be removed upon the same grounds that justify the removal of a testamentary trustee.

The proceeding in the surrogate's court is by petition, citation, etc.

As to the termination of a temporary guardianship, see ante, p. 490.

The termination of guardianship when the ward attains majority is treated under the caption Accounting, post, p. 496.

Code Civ. Proc. § 2858. Removal of guardian appointed by will or deed.

Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court, having jurisdiction to require security from a guardian appointed by will or by deed, may remove such a guardian, in any case where a testamentary trustee may be removed, as prescribed in title sixth of this chapter; and the proceedings upon such a petition are the same, as prescribed in that title for the removal of a testamentary trustee. Where a citation is issued, upon a petition for the removal of such a guardian, he may be suspended from the exercise of his powers and authority, as if he had been appointed by the surrogate's court.

Code Civ. Proc. § 2832. When letters may be revoked for misconduct, etc.

In either of the following cases, the ward, or any relative or other person in his behalf, or the surety of a guardian, may, at any time, present to the surrogate's court, a written petition, duly verified, setting forth the facts, and praying for a decree, revoking letters of guardianship either of the person, or of the property, or both; and that the guardian complained of may be cited to show cause, why such a decree should not be made:

1. *Where the guardian is disqualified by law, or is, for any reason, incompetent to fulfill his trust.*
2. *Where by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the real or personal property of the ward, or by reason of other misconduct in the execution of his office, or his dishonesty, drunkenness,*

improvidence, or want of understanding, he is unfit for the due execution of his office.

3. *Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate, contained in a decree or an order; or any provision of law, relating to the discharge of his duty.*

4. *Where the grant of letters to him was obtained, by a false suggestion of a material fact.*

5. *Where he has removed, or is about to remove, from the State.*

6. *In the case of the guardian of the person, where the infant's welfare will be promoted by the appointment of another guardian.*

Code Civ. Proc. § 2833. Citation; hearing; decree.

Upon the presentation of a petition, as prescribed in the last section, the surrogate must inquire into the matter; and, for that purpose, he may issue a subpoena to any person requiring him to attend and testify in the premises. If the surrogate is satisfied that there is probable cause to believe, that the allegations of the petition are true, he must issue a citation to the guardian complained of; and, upon the return thereof, if the material allegations of the petition are established, he must make a decree, revoking the guardian's letters accordingly; except that, where the case is within subdivision third or fourth of the last section, he must dismiss the proceedings, under the like circumstances and upon the like terms, as prescribed in sections 2686 and 2687 of this act, where a similar complaint is made against an executor or administrator.

Code Civ. Proc. § 2834. Suspension of guardian; effect thereof.

Upon issuing a citation as prescribed in the last section, the surrogate may, in his discretion, make an order suspending the guardian, wholly or partly, from the exercise of his powers and authority, during the pendency of the

special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the guardian and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in sections 2603 and 2604 of this act, with respect to a decree revoking letters.

A party by answering a petition waives his right to object to the sufficiency of the petition. *Matter of Plumb*, 21 N. Y. St. Repr. 107. The extent of the inquiry is entirely in the discretion of the surrogate. *Idem*.

Letters of guardianship of the personal property of an infant of tender years, granted *ex parte*, are subject to revocation on the application of other relatives of the infant. *Matter of Crickard*, 52 Misc. Rep. 63; 102 N. Y. Supp. 440.

A guardianship of the person given to a stepfather may be revoked where he is a zealous Protestant while the father of the ward and the ward himself desire to adhere to the Catholic Faith. *Matter of McConnon*, 60 Misc. Rep. 22; 112 N. Y. Supp. 590.

A guardian will not be removed merely because he contests the right of the former guardian who resigned his office to compensation out of the infant's estate as an attorney at law. *Matter of Twitchell*, 117 App. Div. 301; 102 N. Y. Supp. 163.

Where a mother, guardian of the person of her child, moves to another state, re-marries and dies, and the stepfather is thereafter in that state appointed guardian, the child's domicile will be deemed to have been changed to the foreign state, and an application for guardianship in this state will be denied, and especially unless the stepfather is shown to be an improper person, and even in such a case the application for removal should be to the foreign court. *Matter of Wildberger*, 25 Misc. Rep. 582; 55 N. Y. Supp. 1135.

A testamentary guardian cannot be removed except upon grounds

which would justify the removal of a testamentary trustee. *Markay v. Fullerton*, 4 Dem. 153.

A testamentary guardian who has had attacks of insanity and is otherwise an unsuitable person, will be removed. *Damarell v. Walker*, 2 Redf. 198.

As to procedure in proceedings for the removal of a testamentary guardian, see *Matter of King*, 42 Hun, 607; 4 N. Y. St. Repr. 570. The question of instituting such proceedings by petition was discussed in this case. Under this section such practice seems recognized, and there can be no doubt of its regularity.

A general guardian, or a guardian appointed by will or deed may, by permission of the court, resign his office. But interested parties must be cited, and an accounting is a prerequisite to the discharge.

Code Civ. Proc. § 2835. Application by general guardian for revocation of letters.

A guardian, appointed as prescribed in this title, may, at any time present to the surrogate's court a written petition, duly verified, setting forth the facts upon which the application is founded, and praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the ward may be cited to show cause, why such a decree should not be made. The surrogate may, in his discretion, entertain, or decline to entertain, the application.

Code Civ. Proc. § 2836. Proceedings when application is made by guardian.

If the surrogate entertains an application, made as prescribed in the last section, he must issue a citation, as prayed for in the petition; and he may also require notice of the application to be given to such other persons, and in such a manner, as he deems proper. Upon the return of the citation, a guardian ad litem for the ward must be appointed; and the surrogate may also, in his discretion, allow any person to appear and contest the application, in the interest of the ward. Upon the hearing, the surrogate

must first determine whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, and that the interests of the ward will not be prejudiced by the resignation of the guardian, the surrogate must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged. Upon his fully accounting, and paying all money which is found to be due from him to the ward, and delivering all books, papers and other property of the ward in his hands, either in the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, and discharging him accordingly.

Code Civ. Proc. § 2837. Ward or new guardian may require accounting.

Notwithstanding the discharge of a guardian, as prescribed in the last section, his successor or the ward may compel a judicial settlement of his account, as prescribed in article second of this title, in the same manner and with like effect, as if the decree discharging him had not been made. With respect to all matters connected with his trust, his sureties continue to be liable, until his account is judicially settled accordingly.

Code Civ. Proc. § 2859. Resignation of testamentary guardian.

A guardian appointed by will or by deed, may be allowed to resign his trust, by the surrogate's court, having jurisdiction to require security from him. The proceedings for that purpose, and the effect of a decree made thereupon, are the same, as where a guardian appointed by the surrogate's court presents a petition, praying that his letters may be revoked, as prescribed in article first of this title.

Code Civ. Proc. § 2860. Appointment of successor.

Where a sole guardian, appointed by will or by deed, has

been, by the decree of the surrogate's court, removed or allowed to resign, a successor may be appointed by the same court, with the effect prescribed in section 2605 of this act; unless such an appointment would contravene the express terms of the will or deed.

If a female ward marry, a guardianship of her person terminates, but not a guardianship of her property.

As to the emancipation of a minor from parental control by marriage, see ante, p. 404.

Domestic Relations Law. § 84. Guardianship of married woman.

The lawful marriage of a woman before she attains her majority terminates a general guardianship with respect to her person, but not with respect to her property.

ACCOUNTING BY GUARDIAN; INTERMEDIATE AND FINAL.

A general guardian must in the month of January of each year file a verified account in the surrogate's court. These annual accounts must be examined by the surrogate or by a person appointed by him, and if found unsatisfactory the surrogate may require a further account, or may institute a proceeding through a special guardian for the removal of the general guardian.

Code Civ. Proc. § 2842. Guardian to file annual inventory and account.

A general guardian of an infant's property, appointed by a surrogate's court, must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remains under his control, file in the surrogate's court the following papers:

- 1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a*

list of the articles or items, remaining in his hands; a statement of the manner, in which he has disposed of each article or item, not remaining in his hands; and a full description of the amount and nature of each investment of money, made by him.

2. *A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account.*

Code Civ. Proc. § 2843. Affidavit to be annexed thereto.

With the inventory and account, filed as prescribed in the last section, must be filed an affidavit, which must be made by the guardian, unless, for the good cause shown in the affidavit, the surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner, in which he has disposed of the same, and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount, and nature of each investment made by him, since his appointment, or since the filing of the last annual inventory, and account, as the case requires; and that he does not know of any error or omission in the

inventory or account, to the prejudice of the ward. The surrogate must annex a copy of this and the last section, to all letters of guardianship of the property of an infant issued from his court.

Code Civ. Proc. § 2844. Accounts to be examined annually.

In the month of February of each year, and thereafter until completed, the surrogate must, for the purposes specified in the next section, examine or cause to be examined, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year. The examination may be made by the clerk of the surrogate's court, or by a person specially appointed by the surrogate to make it, who must, before he enters upon the examination, subscribe and take, before the surrogate, and file, with the clerk of the surrogate's court, an oath faithfully to execute his duties, and to make a true report to the surrogate. Where the surrogate seasonably certifies in writing to the board of supervisors, or, in the county of New York, to the board of aldermen, that the examination required by this section cannot be made by him, or by the clerk of the surrogate's court, or by any clerk, employed in his office and paid by the county, the board must provide for the compensation of a suitable person to make the examination.

Code Civ. Proc. § 2845. Proceedings when account defective, etc.

If it appears to the surrogate, upon an examination made as prescribed in the last section, that a general guardian of an infant's property, appointed by letters issued from his court, has omitted to file his annual inventory or account, or the affidavit relating thereto, as prescribed in the last section but one; or if the surrogate is of the opinion, that the interest of the ward requires that the guardian should render a more full and satisfactory inventory or account; the surrogate must make

an order, requiring the guardian to supply the deficiency, and also, in his discretion, requiring the guardian personally to pay the expense of serving the order upon him. Where the guardian fails to comply with such an order, within three months after it is made; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper person special guardian of the ward, for the purpose of filing a petition in his behalf, for the removal of the guardian, and prosecuting the necessary proceedings for that purpose.

Rule in county of New York as to guardian's accounts.

The surrogate, on the written certificate of the person appointed under section 2844 of the Code, to examine the inventory and accounts of guardians filed in said surrogate's office, that a general guardian has omitted to file such inventory or account, or the affidavit required by section 2843, or that the interests of the ward require that the guardian should render a more satisfactory inventory or account, will make an order requiring the guardian to supply the deficiency. Whenever it shall appear by the certificate of said person that the guardian has failed to comply with such order within three months after its due service upon him, or that there is reason to believe that sufficient cause exists for the guardian's removal, the surrogate will appoint a special guardian of the ward, for the purpose of filing a petition in his behalf and prosecuting the necessary proceedings for the removal of such guardian. Surrogate's Rules, N. Y. County, No. 21.

The annual accounting is for the purpose of informing the court of the manner in which the guardian is performing his duties, but does not authorize the judicial settlement of such accounts or the allowance of commissions thereon. *Matter of Hawley*, 104 N. Y. 250. The proceedings are *ex*

parte and are not based upon petition. They are not properly the basis of a creditor's application to secure payment of his debt. *Welch v. Gallagher*, 2 Dem. 40. Neglect to file is not, of itself, sufficient cause for removal of the guardian. *Ledwith v. Union Trust Co.*, 2 Dem. 439.

All guardians at the expiration of the trust, no matter how it terminates, must make a final accounting. (The statutory provisions in the case of the resignation or removal of a guardian have been given, ante, pp. 492, et seq.)

A petition for a compulsory accounting may be made (1) By the ward on attaining majority, (2) by the representative of a ward who has died, (3) by the successor of a guardian, (4) by the guardian's surety where the letters have been revoked, (5) and by the guardian himself.

A guardian is entitled to the same compensation as an executor or administrator.

Code Civ. Proc. § 2847. When judicial settlement of guardian's accounts compelled.

A written petition, duly verified, praying for the judicial settlement of the account of a general guardian of an infant's property, and that he may be cited to attend the settlement thereof, may be presented to the surrogate's court, in either of the following cases:

1. *By the ward, after he has attained his majority.*
2. *By the executor or administrator of a ward, who has died.*
3. *By the guardian's successor, including a guardian appointed after the reversal of a decree, appointing the person so required to account.*
4. *By a surety in the official bond of a guardian whose letters have been revoked; or by the legal representative of such surety. Citation under this subdivision must be directed to both the guardian and the ward.*

Code Civ. Proc. § 2848. Settlement of accounts of guardian of person.

A petition, for the judicial settlement of the account of

a general guardian of an infant's person, may be presented, as prescribed in the last section, or by the general guardian of the infant's property; but upon the presentation thereof, proof must be made, to the surrogate's satisfaction, that the guardian so required to account has received money or property of the ward, for which he has not accounted; or which he has not paid or delivered to the general guardian of the infant's property; and a guardian of the estate only of a minor shall be, for the purpose of this chapter, deemed a general guardian.

Code Civ. Proc. § 2849. When guardian may compel judicial settlement.

A guardian may present to the surrogate's court a written petition, duly verified, praying for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case, where a petition for a judicial settlement of his account may be presented by any other person, as prescribed in either of the last two sections. The petition must pray that the person, who might have so presented a petition, and also the sureties in his official bond of such guardian or the legal representatives of such surety may be cited to attend the settlement.

Code Civ. Proc. § 2850. Citation; proceedings thereupon; compensation.

Upon the presentation of a petition, as prescribed in either of the last three sections, the surrogate must issue a citation accordingly. Section two thousand seven hundred and twenty-seven, sections two thousand seven hundred and thirty-three to two thousand seven hundred and thirty-seven, both inclusive, and sections two thousand seven hundred and forty-one and two thousand seven hundred and forty-four of this act, apply to a guardian ac-

counting as prescribed in this article, and regulate the proceedings upon such an accounting. The accounting party must annex to every account produced and filed by him an affidavit, in the form prescribed in this article for the affidavit to be annexed by him to his annual inventory and account. A guardian designated in this title is entitled to the same compensation as an executor or administrator.

An infant's petition is good though signed by his guardian, without adding his official designation. *Matter of Hurlburt*, 43 Hun, 311; 4 N. Y. St. Repr. 354.

A guardian's sureties need not be cited on an accounting instituted by a ward, but they are, nevertheless, bound by the decree fixing the guardian's liability. Where a guardian does not pay, the ward may prove the decree in a subsequent action against the sureties. *Eberle v. Schilling*, 32 Misc. Rep. 195; 65 N. Y. Supp. 728.

A decree settling a guardian's accounts before his successor is appointed, is not conclusive on an accounting after such appointment. *Matter of Tyndall*, 48 Misc. Rep. 39; 96 N. Y. Supp. 222.

Liability of executors of deceased guardian.

A proceeding by a ward against the executor of his guardian for an accounting for moneys received by such guardian is barred by the lapse of ten years after the time the ward became of age and had a right to compel an accounting. It was further held that, under the facts, there was a presumption of payment to the ward. *Matter of Lewis*, 36 Misc. Rep. 741; 74 N. Y. Supp. 469.

There is no presumption that a trust fund for many years in the hands of a general guardian was unpaid and unaccounted for at his death so as to become part of his estate, and the ward is not entitled to an order compelling his executor to pay over the fund in preference to other creditors except upon proof that the assets in the hands of the executor are part of or were derived from the trust fund. *Matter of Hicks*, 170 N. Y. 195.

Where the complaint of an infant seeking to compel the executors of her deceased general guardian to account does not allege fraud, sub-

division 5 of section 382 of the Code of Civil Procedure, providing that a cause of action does not accrue until the discovery of facts constituting a fraud, has no application. *It seems*, that the ward must bring such action within six years after attaining majority. *Libby v. Van Derzee*, 80 App. Div. 494; 81 N. Y. Supp. 139; *affd.*, 176 N. Y. 591.

GUARDIAN AD LITEM: SPECIAL GUARDIAN.

A guardian ad litem is a guardian appointed to represent an infant plaintiff or defendant in an action. Hence it is usual to appoint an attorney at law, though the general guardian may be appointed.

He must be of sufficient financial ability to answer for damages caused by his negligence or misconduct, and must give security if he receives any of his ward's property.

A special guardian is one appointed to fulfil similar functions in the surrogate's court.

The practice on the appointment of a guardian ad litem is stated in detail in the following statutes and rules.

Code Civ. Proc. § 468. Right of infant to bring action.

Where an infant has a right of action, he is entitled to maintain an action thereon; and the same shall not be deferred or delayed, on account of his infancy.

Code Civ. Proc. § 469. Guardian for infant plaintiff must be appointed.

Before a summons is issued, in the name of an infant plaintiff, a competent and responsible person must be appointed, to appear as his guardian for the purpose of the action, who shall be responsible for the costs thereof, except where such infant prosecutes as a poor person as provided for under section 459 of this act, in which case security for costs shall not be required.

Code Civ. Proc. 470. Application therefor.

The guardian must be appointed upon the application of the infant, if he is of the age of fourteen years, or upwards; or, if he is under that age, upon the application of his general or testamentary guardian, if he has one,

or of a relative or friend. If the application is made by a relative or friend, notice thereof must be given to his general or testamentary guardian, if he has one; or, if he has none, to the person with whom the infant resides.

Code Civ. Proc. § 471. Application for appointment of guardian for infant defendant.

An infant defendant must also appear by guardian, who must be a competent or responsible person, appointed upon the application of the infant, if he is of the age of fourteen years, or upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, as prescribed in section 441 of this act; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. Where the application is made by a person other than the infant, notice thereof must be given to his general or testamentary guardian, if he has one within the State; or, if he has none, to the infant himself, if he is of the age of fourteen years, or upwards, and within the State; or, if he is under that age, and within the State, to the person with whom he resides.

Code Civ. Proc. § 472. Guardian, how appointed. Clerk, when to act.

The court in which the action is brought, or a judge thereof, or if the action is brought in the supreme court, the county judge of the county where the action is triable, may appoint a guardian ad litem for an infant, either plaintiff or defendant, as prescribed in this article. The clerk must act in that capacity for an infant defendant where the court or the judge appoints him. No person, other than the clerk, shall be appointed a guardian ad litem, unless his written consent, duly acknowledged, is produced to the court or judge making the appointment.

Code Civ. Proc. § 473. Guardian for absent infant defendant.

Where an infant defendant resides out of the State or resides within the State, and is temporarily absent therefrom, the court may, in its discretion, make an order designating a person to be his guardian ad litem, unless he, or some one in his behalf, procures such a guardian to be appointed, as prescribed in the last two sections, within a specified time after service of a copy of the order. The court must give special directions in the order, respecting the service thereof, which may be upon the infant. The summons may be served by delivering a copy to the guardian so appointed, with like effect as where a summons is served without the State upon an adult defendant, pursuant to an order for that purpose, granted as prescribed in section four hundred and thirty-eight of this act; except that the time to appear or answer is twenty days after the service of the summons, exclusive of the day of service.

Code Civ. Proc. § 474. Guardian not to receive property until security given.

Except in a case where it is otherwise specially prescribed by law, a guardian, appointed for an infant, as prescribed in this article, shall not be permitted to receive money or property of the infant, other than costs and expenses allowed to the guardian by the court, until he has given sufficient security, approved by a judge of the court, or a county judge, to account for and apply the same, under direction of the court.

Code Civ. Proc. § 475. Security.

The security must be a bond to the infant, in such penalty as the judge directs, not less than twice the sum, or the value of the property, to be received, executed by the guardian and at least two sureties, approved by the judge, and filed in the office of the clerk. The infant,

or any other party to the action, may afterwards apply for an order, directing a new bond to be given, with an increased penalty; or the court may so direct, of its own motion.

Code Civ. Proc. § 476. Last two sections not to apply to general guardian.

The last two sections do not apply to the general guardian of the infant, who has been appointed his guardian ad litem, as prescribed in this article; but the court may, at any time, require the general guardian to give additional security for the faithful discharge of his trust, before receiving money or property of the infant, under a judgment or order in the action.

Code Civ. Proc. § 477. Liability of defendant's guardian for costs.

A person appointed guardian, as prescribed in this article, for an infant defendant in an action, is not liable for the costs of the action, unless specially charged therewith by the order of the court, for personal misconduct.

General Rule 49. Guardians ad litem.

No person shall be appointed guardian ad litem, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defense or prosecution of the suit, and such ability shall be shown by affidavit stating facts in respect thereto. And no person shall be appointed guardian ad litem who is nominated by the adverse party.

General Rule 50. Guardian ad litem, duties, compensation; affidavit to entitle guardian to compensation.

It shall be the duty of every attorney or officer of the court to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable. But no order allowing compensation to guardians ad litem shall be made, except upon an affidavit to be made by such guardian, if an attorney of the court, or if the guardian be not an attorney, then an affidavit to be made by an attorney of the court who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward, and that such guardian has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward.

General Rule 51, in part (amended 1910). Guardian, bond of, before receiving property.

No guardian ad litem for an infant party shall as such guardian receive any money or property belonging to such infant, or which may be awarded to him in the suit (except such costs and expenses as may be allowed by the court to the guardian), unless he has given an undertaking executed by a surety company authorized to do business in this State, in double the amount of such money or property, or a bond secured by a mortgage on improved and unincumbered real property.

Code Civ. Proc. § 2530. Special guardian; when to be appointed.

Where a party, who is an infant, does not appear by his general guardian; or where a party, who is a lunatic, idiot, or habitual drunkard, does not appear by his committee, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the general guardian or committee is adverse to that of the infant, or incompetent person; or that for any other reason, the interests of the latter require the appointment of a special guardian. A person cannot be appointed such a special guardian, unless his written consent is filed, at or before the time of entering the order appointing him.

Code Civ. Proc. § 2531. Notice of proceedings to appoint special guardian.

Where a person, other than the infant, or the committee of the incompetent person, applies for the appointment of special guardian, as prescribed in the last section, at least eight days' notice of the application must be personally served upon the infant, or incompetent person, if he is within the State, and also upon the committee, if any, in the like manner as a citation is required by law to be served. But except in the case specified in title fifth of this chapter, the surrogate may, by an order to show cause, prescribe a shorter time, and direct the service of the order to be made in such a manner as he deems proper. The application may be made at the time of presenting the petition, and, in that case, the order to show cause may, in the surrogate's discretion, accompany the citation.

General Rule 57 (amended 1910). Bond of Special Guardian.

The security required on the sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties in the sum of double the value of the premises including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond over and above all debts, which bond shall be duly acknowledged and accompanied with affidavits of justification made by the sureties. In case, however, the value of the premises including the interest on such value during the minority of the infant, shall exceed the sum of five hundred dollars, the court must require the guardian to give a bond of a surety company authorized to do business in this State or a bond secured by a mortgage on improved and unincumbered real property of the value of the penalty of the bond.

Various other sections of the Code relate to the appointment guardians *ad litem*, or "special" guardians, the terms being used indifferently; but as these guardians are not guardians in strict sense, but rather agents of the court, appointed to protect the interests of infants during litigation, a detailed treatment of the subject is beyond the scope of this work. It is sufficient to point out the duties of these guardians.

A guardian *ad litem* is said to be a species of attorney whose duty it is to prosecute the infant's rights and to bring them to the notice of the Court. *Knickerbocker v. De Freest*, 2 Paige, 304. In the action he cannot waive any of the legal rights of his ward. *Buckley v. Van Wyck*, 5 Paige, 539. Nor can he settle the case without the authority of the Court. *Edsell v. Vandemark*, 39 Barb. 589.

It is said that the guardian *ad litem* should be fearless in investigation and aggressive in policy; he is the right arm of the Court in its zealous care of the infant or other in-

competent person, and who should stand free from even a suspicion of holding relations to any adverse adverse to his ward. In *re Van Beuren's Estate*, 13 N. Y. Supp. 261.

If the guardian for the infant plaintiff is not appointed, the proceedings may be set aside as irregular. *Wilder v. Ember*, 12 Wend. 191. But the jurisdiction of the Court is not affected, and it may in its discretion appoint a guardian *nunc pro tunc* and direct the pleadings amended. *Rima v. Rossie Iron Works*, 120 N. Y. 433.

The guardian of an infant defendant is bound to answer for him. *Farm & Trust Co. v. Reed*, 3 Edw. 414. And if he fails to protect the infant's right to answer, he may be punished. *Knickerbocker v. De Freest*, 2 Paige, 304; *Reed v. Reed*, 46 Hun, 212; 11 N. Y. St. Repr. 524; *affd.* 107 N. Y. 545. The guardian may be compensated out of the subject matter of the action. *Weed v. Paine*, 31 Hun, 10.

Though the statute does not prescribe the qualifications of the special guardian in Surrogate's Court, it is said to be good practice to require the same qualifications that are required of the guardian *ad litem* in Supreme Court. *Storey v. Dayton*, 22 Hun, 450.

CHAPTER XVII.

MASTER AND SERVANT; APPRENTICES.

Although the classical works on Domestic Relations deal with Master and Servant as a subdivision of the title, that relation can no longer be deemed to be domestic. The old patriarchal features have passed away. It has become a matter of pure contract, complicated with special legislation designed to compel the master to safeguard the life and limb of his employees. The parties deal with each other at sword's point, and hence, in theory at least, the relation should no longer be classed as domestic.

But the relation of Master and Apprentice still retains the features of a domestic relation, and, being allowed by the statute, is here treated. So far as decisions on the subject can be discovered.

The apprenticing of minors is very ancient, the essential object being the education of the minor in some useful trade or calling. While the master has a right to the earnings of his apprentice, he is, as a recompense, bound not only to maintain him (unless the parents do so) but to instruct him in the art or mystery in which he is apprenticed. The obligations of the master are quasi parental.

Charitable institutions and poor officers may indenture minors under their charge.

Domestic Relations Law. § 120. Definitions; effect of article.

The instrument whereby a minor is bound out to serve as a clerk or servant in any trade, profession or employ-

ment, or is apprenticed to learn the art or mystery of any trade or craft, is an indenture.

Every indenture made in pursuance of the laws repealed by this chapter shall be valid hereunder, but hereafter a minor shall not be bound out or apprenticed except in pursuance of this article.

Domestic Relations Law. § 121. Contents of indenture.

Every indenture must contain:

1. *The names of the parties;*
2. *The age of the minor as nearly as can be ascertained, which age on the filing of the indenture shall be taken prima facie to be the true age;*
3. *A statement of the nature of the service or employment to which the minor is bound or apprenticed;*
4. *The term of service or apprenticeship, stating the beginning and end thereof;*
5. *An agreement that the minor will not leave his master or employer during the term for which he is indentured;*
6. *An agreement that suitable and proper board, lodging and medical attendance for the minor during the continuance of the term shall be provided, either by the master or employer, or by the parent or guardian of the apprentice;*
7. *A statement of every sum of money paid or agreed to be paid in relation to the service;*
8. *If such minor is bound as an apprentice to learn the art or mystery of any trade or craft, an agreement on the part of the employer to teach, or cause to be carefully and skilfully taught, to such apprentice, every branch of the business to which such apprentice is indentured, and that at the expiration of such apprenticeship he will give to such apprentice a certificate, in writing, that such apprentice has served at such trade or craft a full term of apprenticeship specified in such indenture;*
9. *If a minor is indentured by the poor officers of a*

county, city or town, or by the authorities of an orphan asylum, penal or charitable institution, an agreement that the master or employer will cause such child to be instructed in reading, writing and the general rules of arithmetic, and that at the expiration of the term of service he will give to such minor a new bible.

Every such indenture shall be filed in the office of the county clerk of the county where the master or employer resides.

Domestic Relations Law. § 122. Indenture by minor; by whom signed.

Any minor may, by the execution of the indenture provided by this article, bind himself or herself:

1. *As an apprentice to learn the art or mystery of any trade or craft for a term of not less than three nor more than five years;*

2. *As a servant or clerk in any profession, trade or employment for a term of service not longer than the minority of such minor, unless such indenture be made by a minor coming from a foreign country, for the purpose of paying his passage, when such indenture may be made for a term of one year although such term may extend beyond the time when such person will be of full age.*

An indenture made in pursuance of this section must be signed,

1. *By the minor;*

2. *By the father of the minor unless he is legally incapable of giving consent or has abandoned his family;*

3. *By the mother of the minor unless she is legally incapable of giving consent;*

4. *By the guardian of the person of the minor, if any;*

5. *If there be neither parents nor guardian of the minor legally capable of giving consent, by the county judge of the county, or a justice of the supreme court of the district, in which the minor resides; whose consent*

shall be necessary to the binding out or apprenticing in pursuance of this section of a minor coming from a foreign country or of the child of an Indian woman, in addition to the other consents herein provided;

6. *By the master or employer.*

Domestic Relations Law. § 123. Indenture by poor officers; by whom signed.

The poor officers of a municipal corporation may, by an execution of the indenture provided by this article, bind out or apprentice any minor whose support shall become chargeable to such municipal corporation.

In such case the indenture shall be signed,

1. *By the officer or officers binding out or apprenticing the minor;*

2. *By the master or employer;*

3. *By the county judge of the county, if the support of such child was chargeable to the county, by two justices of the peace, if chargeable to the town, or by the mayor and aldermen or any two of them, if chargeable to the city.*

The poor officers by whom a child is indentured and their successors in office shall be guardians of every such child and shall inquire into the treatment thereof, and redress any grievance as provided by law.

Domestic Relations Act. § 124. Binding out children by charitable corporation; indenture; by whom signed.

An orphan asylum or charitable institution, incorporated for the care of orphans, friendless or destitute children, may bind out as an apprentice, clerk or servant, an indigent or poor child by an indenture in writing. Such child must have been absolutely surrendered to the care and custody of such asylum or institution in pursuance of this chapter, or have been placed therein as a poor person, as provided in section fifty-six of the poor law, or have been left to the care of such asylum or institution

with no provision by the parent, relative or legal guardian of such child, for its support, for a period of one year then next preceding. Such indenture shall bind such child, if a male, for a period which shall not extend beyond his twenty-first year, and if a female, for a period which shall not extend beyond her eighteenth year. Every such child shall, when practicable, be bound out or apprenticed to persons of the same religious faith as the parents of such child. The indenture shall in such case be signed:

1. *In the corporate name of such institution by the officer or officers thereof authorized by the directors to sign the corporate name to such instrument, and shall be sealed with the corporate seal;*

2. *By the master or employer.*

Such indenture may also be signed by the child, if over twelve years of age.

“Another species of servants are called apprentices (from *apprendre*, to learn), and are usually bound for a term of years by deed indented, or indentures, to serve their masters and be maintained and instructed by them. This is usually done to persons of trade in order to learn their art and mystery; and sometimes very large sums are given with them as a premium for their instruction; but it may be done to husbandmen, nay to gentlemen and others. And children of poor persons may be apprenticed out by the overseers of the poor with the consent of two justices till twenty-one years of age.” 1 Bl. Com. 426.

“At common law indentures of apprenticeship are executed by the father or guardian of the minor and the master. The former are bound that the apprentice shall render the services contracted for and the master is bound to teach the art or trade agreed upon and do whatever he may have bound himself to do. * * * The master has a right to the services of his apprentice and to all wages earned by the

apprentice from others but he cannot assign the services of the apprentice to another." Tiffany Dom. Rel. 453.

"Another class of servants are apprentices who are bound to service for a term of years to learn some art or trade. The temptations to imposition and abuse to which this contract is liable, have rendered legislative regulations particularly necessary." 2 Kent Com. 261.

At common law a father might bind a child as an apprentice for the purpose of learning a useful trade or profession. In *re Mc Dowle*, 8 Johns. 328. And on the death of the father the mother has this right. *People v. Gates*, 43 N. Y. 40.

If an apprentice earn anything the master is entitled to it. 1 Salk. 68; 6 Mod. 69; Co. Litt. 117 a. n.; *James v. Le Roy*, 6 Johns. 276.

To entitle a master to recover from a stranger the value of work and services performed for and rendered to him by one alleged to be an apprentice, a valid contract of apprenticeship must be established by the plaintiff. *Barton v. Ford*, 35 Hun, 32.

The indenture must be signed by the master. *People ex rel. Heilbronner v. Hoster*, 14 Abb. Pr. N. S. 414.

The failure of the minor to sign cannot be availed of by the parent, where he has given his consent. *People ex rel. Wehle v. Weissenbach*, 60 N. Y. 385.

If the indenture do not contain a provision that the minor will not leave his master during the time of his indenture, it is invalid. *Barton v. Ford*, 35 Hun, 32.

A mother having received temporary relief from the poor officers is not sufficient to warrant binding out her child under this section. *People ex rel. Heilbronner v. Hoster*, 14 Abb. Pr. N. S. 414. Where a child is placed in the custody of poor officers by a father, as a boarder, one month's board being paid, and he afterwards leaves the state, it is sufficient to authorize such officers to bind out the child. *People ex rel. Wehle v. Weissenbach*, 60 N. Y. 385. A child may be bound out where the father has asked and received alms from the poor authorities. *Schermerhorn v. Hull*, 13 Johns. 270. This case was decided under the Act of 1813; the Revised Statutes modi-

fied the language by striking out the words, "or who shall beg for alms," and is therefore not now applicable.

If the master fail in his obligations, he is liable in damages and to a penalty, and the indenture may be cancelled.

A master is forbidden under a penalty to exact from his apprentice an agreement not to exercise his trade in any particular locality.

An apprentice may be discharged for cause.

Domestic Relations Law. § 125. Penalty for failure of master or employer to perform provisions of indenture.

If a master or employer to whom a minor has been indentured shall fail, during the term of service, to perform any provision of such indenture on his part, such minor or any person in his behalf may bring an action against the master or employer to recover damages for such failure; and if satisfied that there is sufficient cause, the court shall direct such indenture to be cancelled, and may render judgment against such master or employer for not to exceed one thousand nor less than one hundred dollars, to be collected and paid over for the use and benefit of such minor to the corporation or officers indenturing such minor, if so indentured, and otherwise to the parents or guardian of that child.

Domestic Relations Law. § 126. Assignment of indenture on death of master or employer.

On the death of a master or employer to whom a person is indentured by the poor officers of a municipal corporation, the personal representatives of the master or employer may, with the written and acknowledged consent of such person, assign such indenture and the assignee shall become vested with all the rights and subject to all the liabilities of his assignor, or if such consent be refused, the assignment may be made with like effect by the county judge of the county, on proof that fourteen days' notice

of the application therefor has been given to the person indentured, to the officers by whom indentured, and to his parent or guardian, if in the country.

Domestic Relations Law. § 127. Contract with apprentice in restraint of trade void.

No person shall accept from any apprentice any agreement or cause him to be bound by oath, that after his term of service expires he will not exercise his trade, profession or employment in any particular place; nor shall any person exact from any apprentice, after his term of service expires, any money or other thing, for exercising his trade, profession or employment in any place. Any security given in violation of this section shall be void; and any money paid, or valuable thing delivered, for the consideration, in whole or in part, of any such agreement or exaction, may be recovered by the person paying the same with interest; and every person accepting such agreement, causing such obligation to be entered into, or exacting money or other thing, is also liable to the apprentice in the penalty of one hundred dollars, which may be recovered in a civil suit.

“Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters at the Quarter Sessions or by one justice with appeal to the sessions who may by the equity of the statute if they think it reasonable, direct restitution of a ratable share of the money given with the apprentice. * * * But if an apprentice with whom less than ten pounds hath been given runs away from his master he is compellable to serve out his time of absence or make satisfaction for the same.” 1 Bl. Com. 426.

Where an indenture entitled a master to discharge his apprentice at any time, there is a discharge as a matter of law if the master notified the mother of the apprentice that

he had no further need of his services and the mother acting thereon found other employment for her son. *Freit v. Belmont*, 132 App. Div. 723; 117 N. Y. Supp. 656.

The father is liable for the son leaving his master before the expiration of the period. *Mead v. Billings*, 10 Johns. 99; *Bull v. Follett*, 5 Cow. 170. But see *Ackley v. Hoskins*, 14 Johns. 374.

INDEX.

A

Abandonment:	PAGE
As ground for separation	121
failure to show	123
Of children	383
Of wife	383
Abatement:	
Divorce, death of party	80
Abduction:	
Defined	57
As crime	407
Abrogation:	
Of adoption of child	439
application by child	440
application by foster parent	441
Absence:	
Of former wife or husband for five years	49
Action for annulment of second marriage	72
Accounting:	
By guardian	456, 498
intermediate and final	456
unauthorized expenditures	485
annual	498
affidavit	499
when defective	500
rule in New York County	501

Actions :	PAGE
Suit in aid of decree for alimony	231
By husband for wife's services	314
By parent for loss of child's services	409
Bastardy proceedings	421
<i>See</i> Divorce; Separation; Annulment of Marriage; Dower; Breach of Promise; Alienation of Affection; Criminal Conversation, etc.	
 Admeasurement of Dower :	
Interlocutory judgment to provide for	351
appointment of commissioners	351
Duties of commissioners	351
How made	351
Report of commissioners	351
confirmation	353
Final judgment	354
 Adoption of Children :	
History of	429
Voluntary	429
Transfer tax on devolution to	431
Statutory adoption	432
consents	432
court order	434
from charitable institution	434
effect of	437
Abrogation of	439
Revocation of	440
 Adultery :	
Must be clearly proved in divorce action	83
How proved	83
opportunity as proof	86
visiting brothel.....	87
acquiring venereal disease	88
confession of, not proof	88
testimony of paramours, etc.	90
Of plaintiff in divorce action as defense	96
Of wife does not invalidate separation agreement	109
Counterclaim in action for separation	147
Question for jury	152
Testimony of parties	163

INDEX.

525

Adultery—Continued.	PAGE
Husband and wife as witnesses thereto	164
Action for	317
As a crime	319
Adulterous marriage does not make children legitimate	427
Age of Legal Consent:	
What is	55
Action to annul marriage because party was under	55
who may maintain	55
Agency:	
Husband and wife as agents of each other	294
facts establishing	295
facts not showing	296
Alienation of Affection:	
Action for	316
Alimony:	
In action for separation	129
Non-appearance of husband served by publication	136, 210
Effect of failure to pay on right to preference	152
Remarriage of wife	175, 213
<i>Pendente lite</i>	189
proof of marriage	191
probability of success	192
when granted	193, 200
when denied	194
wife with means of support	195
barred by separation agreement	196
order for increase	199
amount	202
practice	205
effect of failure to pay	206
provision for children	207
Permanent alimony	208
custody of children	208
former adjudication	210
vested right	210
effect of failure to provide for alimony in decree	211
death or bankruptcy of husband	213

Alimony—Continued.

	PAGE
remarriage of wife	213, 223
amount	214
modification	219
Regulations when action for divorce brought by wife	220
Modification of alimony <i>pendente lite</i>	221, 225
Enforcing payment	225
Security for	226
Sequestration of husband's property	228
Suit in aid of decree for alimony	231
Payments to be made until decree is modified or vacated	232
Contempt proceedings	232
poverty no defense	234
demand prerequisite to punishment	235

Ancillary Letters of Guardianship :

When granted	467
--------------------	-----

Annulment of Marriage :

By sovereign	2
By court of chancery	40
Void and voidable marriages	44
Not necessary when absolutely void	46
Parties may remarry	50
Not necessary when spouse is sentenced to life imprisonment.	51
Voidable marriages	52
Public policy not involved	54
Party under legal age	54
Legitimacy of children	55, 59, 72
Fraud of infant husband no defense	57
Lack of mental capacity	58
Lack of physical capacity	60
Effect of force, fraud, and duress	63
misrepresentations as to chastity	64
concealment of venereal disease	65
waiver of fraud by cohabitation	69
Former spouse living	72
Who may maintain	76
Right to trial by jury	152, 156
When reference unauthorized	158
No judgment by default	166

Annulment of marriage—Continued.	PAGE
How far judgment conclusive	176
Alimony <i>pendente lite</i>	189
No permanent alimony	208
<i>See Party, Practice.</i>	
Answer :	
In divorce	145
need not be verified	145
In separation	145
Antenuptial Contracts :	
Enforceable in New York	264
When made in foreign State	267
Infancy of parties	267
Subject to rigid scrutiny	268
When writing required	269
Consideration, incapacity to marry	270
Property passing not subject to tax	270
Apprentice :	
Definition	517
Earnings of	518
Discharge of	519
Contract with master in restraint of trade	520
<i>See Indenture.</i>	
Appeal :	
In matrimonial actions	181
to Appellate Division	182
to Court of Appeals	182
to U. S. Supreme Court	183
Stay	183
Arrest :	
When permitted in divorce action	137
Assignment :	
Of money due under separation agreement	110
Of insurance policy for benefit of wife	302, 306
for benefit of children	306
beneficiaries not joining in	307

Assignment—Continued.

PAGE

equitable rights of assignee	308
Of dower bars action for same	347

B**Bankruptcy:**

Does not discharge alimony	214
Claim for goods furnished wife	286

Bastards:

Definition	415
Proof of bastardy	417
Property rights	418
Custody and support of	420, 424
Bastardy proceedings	421
Mother may be compelled to disclose father of	424
How made legitimate	425
Legitimation under foreign law good here	427

Bequest:

In lieu of dower	339
To charitable institution, when void	396

Bigamy:

Common law marriage no basis for prosecution	17
--	----

Bill of Particulars:

When granted in matrimonial actions	144
---	-----

Board:

Earnings of wife in furnishing	289
--------------------------------------	-----

Bond:

Of testamentary guardian	454
Of guardian, appointed by court	474
liability of sureties	477
Of guardian <i>ad litem</i>	509
Of special guardian	511

INDEX.

529

Breach of Promise :	PAGE
Action for	5
Business :	
Separate business of married woman	288

C

Canon Law :	
Of England on divorce	35
Did not become law of New York	40
Effect of annulment of marriage on issue	44
Incestuous marriages	46
Certificate of Marriage :	
As evidence of marriage	31
Charitable Institutions :	
Gift to, when void as to widow or child	396
Adoption of child from	434
As guardian of child	447
Indenture of child by	513
Children :	
Of marriage voidable for infancy of party, legitimate	55
Of marriage voidable for lack of mental capacity, legitimate.	59
Custody of issue of marriage voidable for fraud or duress ..	71
Legitimacy not affected by divorce	97, 100
Right to support after separation of parents	129
Questioning legitimacy in complaint	142
Legitimacy question for jury	152
Custody of, after divorce or separation	175, 208, 216
Provision for, pending action	207
Modification of decree in regard to custody of	219, 224
Rights of, when contingent beneficiaries of insurance policy..	306
Necessary to courtesy	361
Custody of, by parents	370
when father has precedence	374
welfare of child	375
wishes of child	376
Custody may be given to third parties	377
Commitment to reformatory	378

Children—Continued.	PAGE
Habeas corpus to recover child outside jurisdiction	379
Right to support	382
Abandonment of	383
failure to provide medical attendance	388
Right to education	390
Disinheritance of	393
Rights when posthumous	397
Duty to support parents	398
Chastisement of, by parent	401
Parent's right to services of	403, 409
Right to wages	404
Seduction of child	406
Parent's liability for torts of	409
Action for tort	409
Right to property	410
using child's estate to support it	412
Contracts with parents	413
Bastards	415
Adoption of	429
method in New York	432
from charitable institution	434
property rights of foster parent and child	437
abrogation	439
Guardianship of	444
petition for	460
Apprenticing of	513
Indenture made by	515
<i>See Ward; Adoption.</i>	
Citation :	
Appointment of guardian by court	464
contents	464
who served	464
Where petitioner is married woman	464
Removal of guardian	494
Settlement of guardian's accounts	502
City Clerk :	
Duties as to marriage licenses and records	25
Clergyman :	
Solemnizing marriage without license	23

INDEX

581

Cohabitation :	PAGE
Not marriage, but evidence of	11, 13
When bar to action for annulment of marriage for fraud or duress	63, 69
Renders separation agreement void	108
Collusion :	
Safeguards against, in divorce actions	88
In adultery as a defense to divorce action	92
Failure to prevent adultery as collusion	93
Ground for vacating decree	177
Commissioners :	
<i>See Admeasurement of Dower.</i>	
Common Law :	
Marriages	10
Marriage, not basis of prosecution for bigamy, etc.	17
Status of wife at	250
Husband's rights in wife's property	251
action to enforce rights	252
as to wife's realty	253
Suit by wife alone not permitted	254
Wife not permitted to leave property by will	254
Wife's right to earnings	287
Husband's liability for antenuptial debts of wife	297
Husband's right to chastise wife	310
Torts of wife	311
Husband and wife as witnesses	320
Right of courtesy	361
Rights of parents over children	370
Disinheritance of children	393
Bastards at	415, 425
Adoption at	429
Complaint :	
Requisites in matrimonial actions	138
in separation	140
in divorce	141
legitimacy of children	142
Amending complaint	142
Supplemental complaint	143
Action for necessities furnished wife	286

Condonation :	PAGE
As a defense in divorce action	95
As defense in separation	125
Conflict of Laws :	
Validity of foreign divorces	240
Parties resident in foreign state	246
Connivance :	
As defense in action for divorce	92
Constitutional Law :	
Respective powers of state and federal governments over marital status of citizens	1
Contempt :	
Enforcement of payment of alimony	232
poverty no defense	234
demand necessary	235
Failure to pay counsel fees	235
Practice	236
service of process and demand	237
amount of fine, etc.	238
Contract :	
Marriage as contract	2
Contract by third person for wife's benefit	266
Writing necessary when marriage is consideration	269
Of married woman	272
Between husband and wife after marriage	271
against creditors are closely scrutinized	275
Between parent and child	413
To provide for bastard	420
Between guardian and ward	488
With apprentice in restraint of trade	520
<i>See</i> Marriage; Separation Agreements; Antenuptial Contracts; Adoption.	
Contribution :	
Between children for parent's support	398, 401

INDEX.

538

Co-respondents :	PAGE
Right to appear	148
Right to costs	149
Corporation :	
Dower in lands of	329
Costs :	
Right of co-respondent to	149
In matrimonial actions in discretion of court	184
Counsel fees	185
Habeas corpus to recover child	381
In bastardy proceedings	423
Counsel Fees :	
In matrimonial actions	185
when granted	189, 197
failure to pay	235
Counter-claim :	
In actions for divorce or separation	147
County Clerk :	
Records of marriages	29
Court :	
When court must take proof in divorce and annulment	158
Not bound by findings of referee	158
Special direction to enter judgment in divorce	174
Guardians appointed by	457
	<i>See Jurisdiction.</i>
Courtesy :	
Alienation of property by wife	258
Barred by partition of joint property	261
General consideration	361
marriage prerequisite	362
issue necessary for	362
seizin essential	363
Nature of courtesy initiate	365
Power of Legislature over	368
When consummated is vested right	368

Crime :	PAGE
Seduction under promise to marry	7
Common law marriage no basis for prosecution for bigamy ..	17
Solemnizing marriage without license21,	23
False statements in procuring license	22
Violation of Domestic Relations Law by town, city or county clerk	30
Incestuous marriage	48
Abduction57,	407
Marriage procured by fraud, force or duress	71
Advertising to procure divorces	185
Adultery	319
Abandonment of wife	384
of child	384
Failure to educate child	391
Seduction, enticing away child	406

Criminal Conversation :

Common law marriage no basis for action	17
Action for	316

Crops :

As part of widow's quarantine	347
-------------------------------------	-----

Cruel and Inhuman Treatment :

Cause for separation	117
false charges of adultery	117
quarrels, intoxication, etc.	119

D**Damages :**

Breach of promise to marry	6
Marriage procured by fraud	71
In action for dower	348, 349
Seduction of child	407

Death :

Presumed after five years absence	49, 73
Effect on vacation of decree	179
Of husband extinguishes right to alimony	213

INDEX.

585

Decree :	PAGE
Action for separation	128
For support and maintenance without separation	131
<i>See Judgment.</i>	
Deed :	
Duress avoids deed of realty	263
Wife joining in, loses dower	334
Appointing guardian by	449
Default :	
No judgment by default in matrimonial actions	166
Devise :	
Election between dower and	337
To charitable institution, when void	396
Discovery :	
Examination of party before trial in matrimonial actions ..	150
Divorce :	
Under Roman law	33
Influence of Christianity	34
Canon law in England	35
Power of legislatures to grant	37
First legislative divorces in N. Y.	38
in England	40
Jurisdiction of courts of N. Y., wholly statutory	40
Remarriage of innocent party	50
Remarriage of guilty party	78
Grounds in New York	79
Jurisdiction	82
Proof of adultery	83-91
Defenses to action for	91
connivance and collusion	92
condonation	95
adultery of plaintiff	96
Effect of	96
decree granted to wife	97
decree granted to husband	100

Divorce—Continued.

	PAGE
Remarriage	102
does not annul separation agreement	109
Complaint, requisites	141
questioning legitimacy of children	142
Answer	145
counterclaims	147
Preference of divorce action	151
Right to jury trial	152
When reference unauthorized	158
Testimony of parties as to adultery	163
No judgment by default	166
Death of party, effect on vacating judgment	179
Provision for children <i>pendente lite</i>	207
Foreign divorces	239-250
Effect on dower	324, 344

See Alimony; Foreign Judgment.

Divorce, Limited :

See Separation.

Domestic Relations Law :

Formalities of marriage in New York	18, 21
Licenses	22
Duties of town and city clerks	27
Void marriages	45
Voidable marriages	53
Property of married woman	258
Tenancy by entirety	261
Antenuptial contracts	264
Contracts between husband and wife after marriage	271
Powers of married woman	287, 291
Insurance on husband's life	299
Torts of married woman	312
Wages paid to minor	404
Legitimation of bastards	425
Adoption	432
Guardianship	447
Apprenticing children	513

Domicile :

See Residence.

Dower:**PAGE**

When not affected by divorce	99
When right lost by divorce	100
Barred by partition of joint property	261
General consideration of	323
A vested right	324
Rights of wife's creditors	326
Necessity of seizin	327
Contingent remainders	327
Conveyance by husband before marriage	328
Equitable title	328
Lands owned by partnership or corporation	329
Lands exchanged or mortgaged	329
In mortgage	330
Surplus on sale after foreclosure of purchase money mortgage.	330
Purchase money mortgage	332
How lost	334
No release of, to husband	335
Release to stranger	336
Accepting property in lieu thereof	336
Jointure as bar to	337
Election as to	338
Election as to dower or other provision	342
Effect of divorce	344
In land acquired after divorce	344
When forfeited	345
Action for	347
assignment of dower a bar	347
damages from those withholding	348, 349
Action against alienee of husband	349
against heirs, etc.	349
Division of land in action for dower	350
How admeasured	351
Judgment in action for	353
modification	353
Acceptance of sum in lieu of	354
proceedings thereupon	355
sale of property	357
Limitation of action	359

Duress:

Marriage induced by, voidable	52, 63
Avoids deed of real estate	263

E

Election :	PAGE
By married women to take dower or provision in lieu thereof.	337
What deemed election	338, 342
Emancipation :	
Of married women in equity	254
Of child, effect on wages earned by him	405
Enticing away Spouse :	
Action for	316
Entirety :	
Tenancy by	261
Sale on execution	263
Equity :	
Protected married women's rights	255
Estoppel :	
Plaintiff estopped to deny foreign divorce	245
Evidence :	
Certificates and records are evidence of marriage	30
Proof of adultery in divorce action	83
opportunity	86
visiting brothel	87
acquiring venereal disease	88
confession	88
testimony of paramours, etc.	90
Testimony of husband or wife as to adultery	163
Actions for necessities furnished wife	286
Of child's illegitimacy	417

F

Father :	
Rights over children	370
after separation	373
when he has precedence	374
Duty to support child	382

Father—Continued.

PAGE

Contract to provide for bastard 420

Action to compel support of bastard 421

Joint guardian of child with mother 449

See Parent.

Foreign Judgment :

Action for alimony on 226

Enforcement of 227

Validity 239, 240

jurisdiction 240

appearance by defendant 244

plaintiff estopped to deny 245

foreign residence of parties 246

As bar to action here 248

Forms :

Marriage license 25

Fraud :

Annulment of marriage on ground of 40

Renders marriage voidable 44, 52, 63

must be of essence of contract 63

concealment of venereal disease 65

other frauds 66

Absence of spouse, good faith 74

As counter-claim in action for separation 148

Ground for vacating decree 177

G

Gift :

To charitable institution, when void 396

From parent to child good 413

From child to parent 413

Guardian :

In socage 444

powers 446

Charitable institutions as 447

when children committed to..... 447

records 448

Guardian—Continued.	PAGE
care of children	449
Appointed by will or deed	449
when authorized	450
powers and duties	450
will to be proved or deed recorded	450
has custody of ward	453
qualification	453
objections to.....	454
security	455
inventory and intermediate accounting.....	456
judicial settlement of accounts of	456
discharge	457
Appointed by court	457
by Supreme Court	458
by Surrogate	458
for infant over 14, petition	461
nomination by infant	462
temporary for infant under 14 years	462
petition by relative	462
contents of petition	462
term of	462
petition in Surrogate's Court	464
petitioner married woman	464
citation	464
hearing	465
subpœnas	465
general guardian	465
age, etc., of infant to be determined by court	465
Foreign guardian	467
ancillary letters	467
proceedings	468
effect	469
Qualifications of guardian	470
prior right of parents	470
trust companies as	472
Inquiring as to value of infant's property	473
Qualifications of guardian of property	473
of person	474
Security of general guardian	474
Sale of infant's property	475
further security	475
Rights and duties of	479

INDEX.

541

Guardian—Continued.	PAGE
is trustee	479
actions by	480
Relation to ward	481
no obligation to support	481
use of principal	482
Application to court to charge ward for maintenance	483
As trustee of ward's property	488
Investment of trust funds	490
Termination of guardianship	492
Resignation of	496
Accounting of, annual	498
affidavit	499
examination	500
proceedings if defective	500
in New York County	501
Final accounting	502
guardian of person	502
compelled by guardian	503
citation	503
Compensation	503
Liability of executors of	504
<i>Ad litem</i>	505
security	507
duties, etc.	509
Special guardian	510

H

Habeas Corpus, Writ of:

To recover child	371
detention by Shakers	372
Renewal of petition for	379
Child without the jurisdiction	379
Practice	381

Husband :

When rights in wife's property unaffected by divorce	100
Duty to support wife	105, 277
As witness in divorce action	164
Liability for wife's counsel fees	185
Sequestration of property of	228
Punishment for contempt	232

Husband—Continued.	PAGE
Right to wife's property at common law	251
profits of realty	253
Tenancy by entirety	261
Contract with wife after marriage	271
Liability for money loaned wife	279
for services to her	280
for rent	281
for wife's funeral expenses	281
Not liable when wife is supplied with necessaries	281
Goods sold on wife's credit	283
Right to wife's services	292
Partnership with wife	294
As agent of wife	294
Liability for wife's antenuptial debts	297
Right of wife to insure life of	299
Personal rights; head of family	309
Liability for wife's torts	311
Action for loss of wife's services	314
Cannot sue wife for personal injury	316
As witness for or against wife	320
Joint guardian of child with wife	449

I

Idiot or Lunatic :

Marriage by, when voidable	52,	58
----------------------------------	-----	----

Illegitimates :

"Bastard" defined	415
Proof of illegitimacy	417
Property rights of bastards	418
Custody and support of bastard	420
Mother may be compelled to disclose father of	424
How made legitimate	425
Legitimation under foreign law good here	427

Incestuous Marriages :

Are void	9,	46
Defined		45
Are criminal		48
Do not make children legitimate		427

INDEX

548

Incompetent Person :

PAGE

See Idiot.

Indenture :

Defined	513
Contents	514
By minor	515
By poor officers	516
By charitable corporation	516
Penalty for failure of master to perform terms of	519
Assignment on death of master	519

Infant :

Marriage by, when voidable	52, 53
action to annul	54
Effect of infancy on antenuptial contract	267
Nomination of guardian by, over fourteen years	462
Temporary guardianship when under fourteen years	462

See Ward; Children.

Inheritance :

Rights of illegitimates	418
Rights of adopted children	429, 437

Injunction :

Cohabitation of husband with third party	137
Against foreign action	249

Insurance :

Wife's right to insurance on husband's life	299
rights of husband's creditors to proceeds	300
rights of wife's creditors to proceeds	301
Assignment of policy for benefit of wife	302
prior to statute	304
policy taken out of state	304
policy not originally payable to wife	304
avoiding assignment	305
Rights of children named as beneficiaries	306
Rights of beneficiaries not joining in assignment	307
Rights of assignee	308

Interlocutory Judgment :

See Judgment, Interlocutory.

Inventory :	PAGE
Annual, of general guardian	498
affidavit annexed	499
examination	500
proceedings when defective	500

Issues :

Framing of in divorce case	152, 157
----------------------------------	----------

J**Jointure :**

Election between dower and	337, 338
Bar to dower	337

Judicial Settlement :

By testamentary guardian	456
Of general guardian's accounts	502
when compelled	502
of guardian of person	502
compelled by guardian	503
citation and proceedings	503

Judgment :

No judgment by default in divorce, separation or annulment	166, 168
Final judgment, when entered	171, 174
modification	175
Judgment annulling marriage, how far conclusive	176
Vacating, in matrimonial action	177
When not vacated	180
Effect of former, on question of alimony	210
Award of alimony vested right	210
Modification to award alimony not allowed	211
Modification as to custody of children and alimony	219, 221, 224
when divorce action brought by wife	220
Revocation of, in action for separation	221
In action for dower	353
<i>See</i> Decree; Foreign Judgment; Divorce; Separation; Dower.	

Judgment, Interlocutory :

In divorce action	171
effect	173
In action for dower	350

INDEX.

545

Jurisdiction :

PAGE

Of courts of N. Y. in matrimonial actions wholly statutory ..	40
Annulment of marriages in chancery	40
Residence in divorce actions	80
Facts necessary for jurisdiction in divorce action	82
Action on separation agreement	111
Action for separation	113
Of foreign courts in divorce actions	240
Habeas corpus to recover child outside state	379
Of courts to appoint guardians	457

Jury :

Questions for jury in matrimonial actions	152
---	-----

L

Legislature :

Power to grant divorces	36
in New York	38

Legitimacy of Children :

Bastards	415
Governed by domicile	416

See Illegitimates.

Letters of Guardianship :

See Guardian.

Lex domicilii :

Governs legitimacy of children	416
--------------------------------------	-----

Lex loci contractus :

Place of marriage governs validity	7
exceptions to rule	9, 56
Remarriage in foreign state after divorce	104

License :

Failure to procure does not invalidate marriage	21
When to be obtained in New York	22
form	25
by whom issued	25

Limitation of Action :		PAGE
Annulment of marriage for physical incapacity	60	
on ground that former spouse is alive	78	
Action for separation	116	
Action for dower	359	

Lunacy :

Annulment of marriage on grounds of	40
Marriage by lunatic voidable	52, 58

M**Marriage :**

Defined	1
Sovereign shall determine status	1, 2
As a contract	2
Promise to marry in future does not constitute	4
Validity of, governed by <i>lex loci contractus</i>	7, 9
At common law	10
Sexual relations, not marriage	11
Illicit relation cannot ripen into marriage	13
Originally void because of incompetence may become valid ..	16
At common law not basis for bigamy prosecution	17
Solemnization of, by whom	20
how solemnized	21
License necessary in New York State	21
how obtained	22
false statements in, punishable as perjury	22
penalty for clergyman violating	23
unlicensed marriage, not void	24
statutory provisions as to form of licenses, duties of clerks, etc.	25
Certificate and records of, are presumptive evidence of	30
when void or voidable	44, 45, 49
By infant	54
By idiots and lunatics	58
By one lacking physical capacity	60
Rendered voidable by force, fraud or duress	63
Valid if former spouse absent five years	72
voidable on return of spouse	72
When second marriage void for bad faith	74
Second marriage by divorced person	78
Marriage in foreign state after divorce	104

INDEX

547

Marriage—Continued.

PAGE

Not dissolved by interlocutory judgment	173
Proof of, necessary to obtain alimony <i>pendente lite</i>	191
Necessary for dower	324
Necessary for courtesy	361
Of parents makes bastard legitimate	425

See Annulment of Marriage.

Married Woman :

See Wife.

Married Woman's Acts :

History of, in New York	256
Effect on courtesy	366

Master :

Definition of indenture	513
Obligations of	513
Contents of indenture	514
Right to earnings of apprentice	518
Duties	519
Penalty for failure to comply with indenture	519
Assignment of indenture after death of	519
Contracts with apprentice in restraint of trade	520

Minor :

See Ward; Children; Infant; Apprentice.

Misrepresentation :

As to previous chastity ground for annulment	64
Concealment of venereal disease, annulment	65

Mortgage :

Given as security for separation agreement, when void	108
Effect on dower	330

Mother:

Right to custody of children	370
as against father after separation	373
when mother has precedence	374
Right to custody of bastard	420

Mother—Continued.		PAGE
Compelling father to support bastard		421
May be compelled to disclose father of bastard		424
Support of bastard by		424
Joint guardian of child with father		449
<i>See Parent.</i>		

O

Orphan Asylum:

Guardian of children	447
Records of	448

Pardon:

Does not restore marital rights	52
---------------------------------------	----

Parents:

May bring action for annulment of marriage	55,	70
Consent to marriage of infant no bar to action for annulment.		56
Right to custody of children		370
habeas corpus		371
Which, has better right to custody of children after separation.		374
welfare of child		375
wishes of child		376
Duty to support child		382
Failure to provide medical attendance		388
Liability for necessities for children		389
Duty to educate children		390
Disinheriting children		393
Right to support by child		398
Right to chastise child		401
Right to services of child		403
and wages		405
Damages for seduction of child		406
Liability for child's torts		409
Action for loss of child's services		409
Rights over child's property		410
Contracts with children		413
Adoption of children		429
Rights in property of adopted child		437
Right to guardianship of child	444, 449,	470
As guardians of child's property		445

P

Parties:	PAGE
Marriage by one under age of legal consent voidable	54
person of age cannot maintain action for annulment	55
parent, or guardian of infant, may bring action	55
infant necessary party	56
Action to annul marriage because of lack of mental capacity of parties	59
Annulment of marriage for fraud, or duress	63
action by parents	70
Annulment of marriage because former spouse living	76
Abatement of divorce action by death of party	80
Action on separation agreement	111
Action brought by next friend	138
Examination before trial in matrimonial actions	150
Co-respondent may appear in divorce action	158
Testimony as to adultery	163
Suit by wife alone not permitted at common law	254
Action for seduction of child	406
Action by guardian	480
Revocation of letters of guardianship	496
Accounting of guardian	502
 Partnership:	
Between husband and wife	294
Dower in lands of	329
 Penalty:	
For violation of marriage license law by clergyman or officer. by clerks	23 30
Remarriage after divorce not permitted to guilty party	102
Failure to educate child	391
For failure to comply with indenture of apprenticeship ..	519
 Personal Injuries:	
Wife may maintain action for	314
Wife cannot sue husband for	316
Husband cannot sue wife for	316
 Petition:	
To abrogate adoption	439

Petition—Continued.

PAGE

To compel testamentary guardian to give security	454
To compel settlement of accounts of testamentary guardian ..	456
For appointment of guardian	461
contents	461
For temporary guardian	462
For appointment of guardian by surrogate	464
For ancillary letters of guardianship	467
For maintenance of infant	483
To remove guardian	493
To compel guardian to account	502

Physical Incapacity:

Annulment of marriage for	60
Action to be begun within five years	60
No right to trial by jury on issue	152

Pleading:

See Complaint; Bill of Particulars; Counter-claim, etc.

Polygamous Marriages:

Are void	49
Do not make children legitimate	427

Practice:

Regulations respecting judgment	134
Service of summons in matrimonial actions	134
by publication	136
Arrest in divorce action	137
Injunction	137
Action brought by next friend of infant, etc.	138
Amending complaint in divorce action	142
Serving pleadings on co-respondent	148
Right of co-respondent to costs	149
Preference of divorce action	151
Framing issues for jury	152, 157
When reference not allowed	158
Judgment rendered only by court	159
No judgment by default in matrimonial actions	166
Interlocutory judgment in divorce	171
effect	173
Entry of final judgment	174

INDEX.

551

Practice—Continued.	PAGE
modification	175
Stay pending appeal	183
Order for alimony <i>pendente lite</i>	205
service of papers on non-resident	205
Modifying judgment as to alimony or custody of children. 219,	
221, 225	225
Revocation of judgment of separation	221
In contempt proceedings, failure to pay alimony	236
Actions for necessaries furnished wife	286
Action for dower	347
acceptance of gross sum	355, 357
Habeas corpus to recover child	381
Bastardy proceedings	422
Adoption of child	433
abrogation of	430
Accounting of guardian	456
Appointment of guardian by court	460, 464
Ancillary letters of guardianship	468
Removal of guardian	492
Accounting of guardian	498
Appointment of guardian <i>ad litem</i>	505
<i>See</i> Trial; Appeal; Costs; Alimony.	
 Preference:	
Divorce action	151
 Principal and Agent:	
<i>See</i> Agency.	
 Process:	
Service of summons in matrimonial actions	134
Service, in contempt proceedings	237
Service in foreign divorce actions	240
 Promise to Marry:	
Does not constitute marriage even though followed by co-	
habitation	4
Breach	5
 Public Policy:	
Annulment of voidable marriage	54

Q

Quarantine :	PAGE
Right of widow to	346

R

Real Property:

Married woman's rights in	258
Tenancy by entirety	261
sale on execution	263
conveyance and partition	263
What constitutes seizin	326

*See Dower.***Receiver:**

Failure to pay alimony	226
------------------------------	-----

Records:

What records of marriages to be kept in New York State	25
---	----

Recrimination :

As defense in divorce action	96
------------------------------------	----

Referee :

Trial of matrimonial actions by	158
qualifications	159
report of	160
To admeasure dower	351

Reference :

When ordered in divorce and annulment	158
not in case of default	158

Release :

Of dower by married woman	334, 336
by divorced woman	335

Re-Marriage:

After judgment of divorce	50, 102
When spouse is civilly dead	51
Does not prevent vacation of judgment of divorce	179
Effect on alimony	213, 219, 223

INDEX.

558

Report :

PAGE

Of referee in matrimonial action	160
--	-----

Residence :

Acquisition of residence by married woman	80
Must be bona fide	80
Action for separation	115
When married woman deemed resident	137
Effect of foreign residence on validity of foreign divorce decree.	246

Revocation :

Of decree in separation action	131
Of adoption of child	440
Of letters of guardianship	493

Roman Law :

Divorce	33
---------------	----

S

Seduction :

When action maintainable	6
Action for seduction of child	406

Seizin :

In husband necessary to dower	324
What constitutes	326
In wife essential to right of courtesy	361

Separation :

Agreement to separate, when against policy	106
Action for separation	113
causes and jurisdiction	113
necessary proof	114
limitation of action	116
cruelty warranting decree	117
false charges of adultery	117
quarrels, drunkenness, etc.	119
conduct making it unsafe and improper for parties to live together	120
abandonment and neglect to provide	121

Separation—Continued.	PAGE
Defenses to action	124
condonation	125
misconduct of plaintiff	126
Relief given by decree	128
support of wife	129
Revocation of decree	131
Complaint, requisites	140
Answer	145
Counterclaims	147
No right to jury trial	152
No judgment by default	166
How far judgment conclusive	176
Vacating judgment	177
Reconciliation of parties	177
Provision for children <i>pendente lite</i>	207
Revocation of judgment	221
.	
Separation Agreements :	
General consideration of	105, 276
Trustee unnecessary	106
When void	107
Survives husband's death	109
Not annulled by divorce	109
Inability of husband to pay	110
Assignment of money due	110
Breach by wife	110
Actions on	111
Bar to alimony	196
Considered in fixing alimony	216
.	
Sequestration :	
Enforcing payment of alimony	228
.	
Services :	
To wife, husband's liability for	230
Rendered by wife to husband, no compensation	292
Parent's right to child's services	403, 409
.	
Shakers :	
Habeas corpus to recover child detained by	372

INDEX

555

Solemnization :	PAGE
Not necessary at common law	10
Formalities in New York	18
Effect of failure to procure license	21
Form of license	25
Sovereignty :	
Marital status determined by	1
State may annul marriage relation	2
Statutes :	
Limitation of action for annulment of marriage on ground of physical incapacity	60
Of fraud in antenuptial contracts	269
<i>See Domestic Relations Law; Married Woman's Act.</i>	
Stay :	
Pending appeal in matrimonial actions	183
Failure to pay alimony <i>pendente lite</i>	206
Summons :	
Service of, in matrimonial actions	134
by publication	136
Service of, in foreign actions for divorce	240
Support :	
Wife's right to98,	277
when may be lost	285
Penalty of failure to support wife	383
What is	386
Sureties :	
On guardian's bond	477

T

Tax :	
No tax on property passing under antenuptial agreement.	270
When no transfer tax although child not adopted	431

Torts :	PAGE
Husband's liability for wife's torts	311
Married woman may maintain action for	314
Parent's liability for child's	409
Actions for tort against child	409
 Town Clerk :	
Duties in regard to marriage licenses and records	25
 Trial:	
Preference of divorce action	151
Failure to pay alimony	152
Right to jury trial in divorce and annulment	152
Framing issues	152
other than adultery	156
<i>See Divorce; Annulment; Referee, etc.</i>	
 Trust Property :	
When it must be transferred	271
Investment of by guardian	490
 Trustee :	
Not necessary in separation agreements	106

V

Validity :	
Of marriage, governed by <i>lex loci contractus</i>	7
Of marriage, once void, upon removal of incompetence	16
 Void Marriages :	
May become valid	16
Not necessarily so because of no license	24
Defined	45
Annulment not necessary	46
Through polygamy	49
Second marriage may be void for bad faith	74
 Voidable Marriages :	
What are	52
Annulment	54

W

Wages:	PAGE
Validity of payment of, to minor	404
Waiver:	
Fraud waived by cohabitation	69
Ward:	
Relation to guardian	481
Support of	483
Guardian trustee of property of	488
Reclaiming trust property	490
	<i>See Guardian.</i>
Widow:	
Dower rights of	323-344
Quarantine	346
	<i>See Dower.</i>
Wife:	
Right of wife to support after divorce	98, 277
Right to dower after divorce	99, 100
Use of husband's name after divorce	102
Right to support	105, 208
after separation	129
Residence of married woman	137
As witness in divorce	164
Identity merged with husband's at common law	250
Right to property at common law	251
paraphernalia	252
rents	253
No right to make will at common law	254
Early rights in equity	255
Married Woman's Acts in New York	256
Present right to real estate	258
Contract with husband after marriage	271
Powers of married woman	272
to make contracts	272
Forfeiting right to support	285
Right to earnings	287
Liability as sole trader	290

Wife—Continued.**PAGE**

No compensation for services to husband	292
Partnership with husband	294
As agent of husband	294
Husband's liability for antenuptial debts of	297
Liability for husband's debts	298
Insurance on husband's life	299
right to proceeds	300
Chastisement at common law	310
Husband not liable for torts of	311
May maintain action for tort	314
Cannot sue husband for personal injury	316
As witness for or against husband	320
Release of dower	334
Receiving property in lieu of	336
Abandonment of	383
Joint guardian of children with husband	449
Guardianship of married woman	498

*See Mother.***Will:**

Husband's right to dispose wife's property by, at common law	251
Wife could not make, at common law	254
Election as to devise in lieu of dower	337, 339
Disinheriting children	393
Revocation by marriage or birth of issue	395
Bequest to charity, when void as to wife and child	396
Appointing guardian by	449

Witness:

Husband and wife as witness in divorce action	164
As witnesses for or against each other	320

(Total number of pages, 570.)

E. J. M.
3/22/12

DISBROW'S DIGEST OF THE CODE OF CIVIL PROCEDURE (SECOND EDITION). It is a handbook unequaled for review. It starts in with the service of Summons or other process and follows it through all successive stages to the decision of the highest court on appeal. It uses the exact words of the Code, yet strikes out all unnecessary verbiage. Bound in Law Buckram, 151 pages. Price \$1.50.

BRICE'S BAR EXAMINATION QUESTIONS AND ANSWERS (SECOND EDITION). Over 400 more Questions and Answers than in any other book purporting to publish the questions actually asked in Examinations. Indexed under the main headings of the law so that any subject can be reviewed by itself. Heavy paper covers, about 350 pages. Price \$2.50 net, \$2.65 delivered.

AULL'S CODE QUIZZER (SECOND EDITION). This is a complete Digest of the Code of Civil Procedure, in Quizzer form, touching fully on the important sections, and including questions and answers compiled from the Bar examinations since 1896. Heavy paper covers. Price \$1.25.

BAYLIES' TEST QUESTIONS. "It is the work of a man thoroughly acquainted with the subject, performed in a careful and intelligent manner. It is by far the most useful work of the kind which has come to my notice, and is what it purports to be, something more than a mere quiz book, giving as it does the answers to the questions and citing authorities; thus giving the student an opportunity to acquaint himself with decisions bearing upon and stimulating his interest in the subject."—J. Newton Fiero, Dean Albany Law School. 450 pages. \$4.00.

For sale by all Law Booksellers.

